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IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.

Miami-Dade County Courthouse
Miami, Florida
Wednesday, 9:35 a.m.
June 23, 1999

TRIAL - VOLUME 345

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

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APPEARANCES:

STANLEY M. ROSENBLATT, ESQ.
SUSAN ROSENBLATT, ESQ.
CLIFFORD DOUGLAS, ESQ.
On behalf of Plaintiffs

DECHERT PRICE & RHOADS
ROBERT C. HEIM, ESQ.
SEAN P. WAJERT, ESQ.
On behalf of Defendant Philip Morris

COLL DAVIDSON CARTER SMITH SALTER & BARKETT
NORMAN A. COLL, ESQ.
On behalf of Defendant Philip Morris

ZACK KOSNITZKY
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On behalf of Defendant Philip Morris

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DOUGLAS CHUMBLEY, ESQ.
On behalf of Defendant R.J. Reynolds

JONES, DAY, REAVIS & POGUE
RICHARD M. KIRBY, ESQ.
DIANE PULLEY, ESQ.
On behalf of Defendant R.J. Reynolds

KING & SPALDING
MICHAEL RUSS, ESQ.
RICHARD A. SCHNEIDER, ESQ.
On behalf of Defendant Brown & Williamson

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
KELLY ANNE LUTHER, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

SHOOK HARDY & BACON
EDWARD A. MOSS, ESQ.
WILLIAM P. GERAGHTY, ESQ.
On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
On behalf of Defendant Lorillard

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1 APPEARANCES (Continued)

2

DEBEVOISE & PLIMPTON

3 ANNE COHEN, ESQ.

JOSEPH R. MOODHE, ESQ.

4 On behalf of Defendant The Council for Tobacco Research

5 GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL

DAVID L. ROSS, ESQ.

6 On behalf of Defendant Lorillard

7 MARTINEZ & GUTIERREZ

JOSE MARTINEZ, ESQ.

8 On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute

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KASOWITZ BENSON TORRES & FRIEDMAN

10 AARON MARKS, ESQ.

NANCY STRAUB, ESQ.

11 On behalf of Defendants Liggett Group
and Brooke Group

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1 (Whereupon, the following pr' ir s were had:)

2 THE COURT: Good mornir . Have a seat,
3 please.

4 Anything we want to discuss before we get
5 under way?

6 MS. ROSENBLATT: No. I had confirmed with
7 Mr. Heim that apparently what's going to be shown on
8 the screen is strictly documents in evidence. I had
9 asked whether anything else; he said, no. Apparently,
10 documents in evidence.

11 So with that understanding, there's nothing
12 to discuss.

13 THE COURT: Are we going to be using the same
14 machine as we used before or is this something new?

15 MR. HEIM: No, Your Honor. They were so
16 disappointed with the way I performed with that little
17 Elmo machine that they gave me something new.

18 THE COURT: A laser disc?

19 MR. HEIM: With this little thing, supposedly
20 the transcript or the exhibit comes up on the screen.
21 But we'll see.

22 MR. ROSENBLATT: The jury will very quickly
23 understand the difference between low tech and high
24 tech.

25 THE COURT: All right. Let's get the jury

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1 out then.

2 MR. HEIM: Judge, the only -- to clarify what
3 counsel said, everything that's on there is something
4 that the jury has already seen or is in evidence except
5 for that one chart which I showed to counsel in
6 advance.

7 THE COURT: Which one is it?

8 MS. ROSENBLATT: And we do object. When that
9 was going to come up, we do object to that. I think
10 that goes beyond the jury instructions in terms of an
11 issue that's for another phase of the trial.

12 MR. HEIM: Your Honor, I could draw that, if
13 I wanted to, for the jury; it would be perfectly
14 permissible. This enables me to save some time.

15 THE COURT: All right. Turn it over.

16 MS. ROSENBLATT: It's not the exhibit, it's
17 the content. Whether that's drawn or otherwise, I
18 think that's a Phase II issue. I think that goes
19 beyond the concept of the instruction which goes to
20 strict liability of consumer expectations.

21 THE COURT: You're not going to use it right
22 away?

23 MR. HEIM: I'm going to use it about ten
24 minutes into my opening.

25 THE COURT: Then we better discuss it.

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1 All right. Tell them to hold off.

2 MR. HEIM: It is a summary, awareness
3 evidence, that was the subject of Dr. Ford's testimony
4 over the course of three days.

5 THE COURT: Okay. And your problem is --

6 MS. ROSENBLATT: Our problem is that this is
7 really a Phase II issue. The only count that it's
8 relevant to at all is strict liability and tort because
9 the instruction is a product is unreasonably dangerous
10 because of its design if it fails to perform as safely
11 as an ordinary consumer would expect.

12 And I just think that that goes beyond and
13 crosses over a line into an assumption of the risk,
14 comparative fault kind of situation.

15 THE COURT: They will be instructed on the
16 assumption of the risks, so to speak, or comparative
17 negligence issue during the instructions. You've
18 argued on it yourself. But part of the testimony in
19 this trial did concern whether or not there was in fact
20 a, quote, controversy of which the public may have been
21 aware. And that dates back through many years.

22 And I think, in looking at the board, I don't
23 have any problem with it, except for the editorial
24 comment, Mountain of Evidence, which is on there.

25 MR. HEIM: That's a heading, Your Honor. And

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1 at several places in my argument, I show a heading just
2 to show the topic that I'm covering, and that's all I
3 do.

4 THE COURT: I'll overrule the objection if
5 it's used for the purposes of corresponding with the
6 testimony elicited, for that purpose alone, not for
7 assumption of risk purposes.

8 MR. HEIM: And, Your Honor, the general
9 comments that I make today I will not go anywhere near
10 discussing the concept of comparative negligence.

11 THE COURT: All right. Let's bring them out.

12 THE BAILIFF: Bringing in the jury. Jurors
13 entering the courtroom.

14 (The jurors entered the courtroom.)

15 THE COURT: All right, folks. Good morning.

16 Have a seat, please.

17 I'm going to move over here so we can see
18 you. We've got this monster television set we're going
19 to be using, blocking the view a little bit. But have
20 any of you folks seen anything over the night on T.V.?

21 He just wants a pencil. Something to write
22 with?

23 Anybody seen anything on television, read
24 anything in papers, periodicals, magazines, been
25 exposed in any manner, shape or form to any comment or

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1 any information about this case or any other case, and
2 any allied issues or subject matter?

3 Nobody, that's good, because we still want
4 this trial to be decided on the issues brought about
5 only in this courtroom.

6 You were told the other day that both sides
7 would have an opportunity to argue their case before
8 you. Both sides have about two days to do that.

9 Plaintiff has already argued Monday and Tuesday,
10 reserving some time for rebuttal, which may come Friday
11 or Friday morning; the defense will present its closing
12 argument to you. They will have the same amount of
13 time, two days. And today being Wednesday, they'll
14 have Wednesday and Thursday for their argument.

15 They will break it up, as I understand it,
16 into several sections, giving each of the defense
17 counsel who wishes an opportunity to address you within
18 that time frame. I don't know what their actual
19 schedule is, but it will be within the two-day time
20 frame.

21 During the course of the presentation, notice
22 this big T.V. set here, there will be some matters
23 shown to you on the screen. I can't see it, I may have
24 to step down and go over there and look along with you
25 so that I will be aware of it, because I don't have a

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1 monitor screen here myself.

2 MR. HEIM: Your Honor, I think that monitor
3 is for you.

4 THE COURT: Is that what that's for? All
5 right. Then I won't have to. All right. If you are
6 ready, counsel and if the jury is ready, we'll proceed.

7 MR. HEIM: Good morning, everyone.

8 THE JURORS: Good morning.

9 MR. HEIM: May it please the Court --

10 THE COURT: Sure.

11 MR. HEIM: -- counsel, and ladies and
12 gentlemen.

13 It occurs to me, I guess, that it's been
14 eight months since I've been allowed to talk to you
15 directly. And those have been eight months during
16 which you've had a silent role in the trial of what has
17 certainly been a unique case.

18 But all of that is -- it's going to change in
19 just a few days, because in just a few days, when you
20 go back into the jury room, you'll be going back there
21 for a whole different purpose: You'll be going back
22 there to deliberate and to get to a result in this case
23 that is just and right, and it's based on the evidence,
24 and it follows the law.

25 THE COURT: Excuse me, counsel, one second.

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1 Can you all hear in the back of the room?
2 We're trying to work out the audio system here for you.
3 We'll try. If not, you'll have to speak a little
4 louder.

5 MR. HEIM: I'll try.

6 Well, that's what your job is going to be in
7 just a few more days, and at this point, probably
8 looking forward to it.

9 I'm going to review evidence with you this
10 morning in the time that I have. But before I do that,
11 on behalf of everybody, really, I want to thank you for
12 your patience. Surely, if patience is a virtue, you'll
13 all be rewarded somewhere someday, because you've had
14 great patience and for your attention in staying with
15 this case as long as you have.

16 I'm sure that over the course of eight
17 months, the evidence was interesting at times, and I'm
18 sure at other times it was maybe a little boring and
19 repetitious, and I know certainly it was long. But you
20 stayed with it all this time. And it really is
21 something for which you deserve everyone's gratitude.

22 It occurs to me, as I say that, that in all
23 my years I've never been a juror. And as a trial
24 lawyer, I expect that I probably never will be a juror.
25 But I've always thought that serving as a juror is one

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1 of the highest duties that a citizen can perform during
2 peacetime, because it takes dedication.

3 You have to postpone your normal impulse to
4 make up your mind before you've heard everything, and
5 you have the tough job of taking on an assignment of
6 dealing with the evidence that you heard in a courtroom
7 and coming to a decision. And that's a lot to ask and
8 we really are grateful for you taking all that on.

9 Now, when I was here and was able to talk to
10 you like this eight months ago, I told you that lawyers
11 are not like politicians. When we get up in our
12 opening statements, we make -- we tell you what we
13 believe the evidence is going to be and what the
14 evidence is going to show.

15 And when we do that, that's a commitment that
16 we make. And when we make that commitment, you should
17 hold us to it. And I believe that after you've looked
18 at all the evidence, after you've considered it, you
19 will find that we kept that commitment, that we kept
20 the commitment that we made to you when we opened this
21 case back in October.

22 Back then, when I made my opening remarks,
23 back on October 21st or October 22nd, I told you that
24 the case was about choice. I said it was about
25 people's choice to smoke and their choice to continue

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1 to smoke.

2 And I said it was about responsibility: Who
3 should be responsible for those choices? Should the
4 tobacco companies be responsible for people's choices
5 to smoke? That's what I told you back then --

6 MR. ROSENBLATT: Objection, Your Honor. The
7 choice of smokers is not an issue in the first phase of
8 the case.

9 THE COURT: Sustained about the choice. I
10 don't want the choice issue to be addressed, if that's
11 what you're getting at.

12 MR. HEIM: I'm not getting to that point,
13 Your Honor. I'd like to talk about this.

14 THE COURT: I'll sustain the objection.

15 MR. HEIM: May we approach for a moment?

16 THE COURT: No. It's not necessary.

17 MR. HEIM: The case is about responsibility.
18 And the case is certainly about whether people smoking
19 is involuntary.

20 MR. ROSENBLATT: Objection, Your Honor. This
21 is not a first phase issue.

22 MR. HEIM: Your Honor, they say addiction
23 makes people smoke.

24 THE COURT: Just a moment. We are not to
25 discuss choice of smoking. That's not the issue at

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1 this point. What we're talking about is the
2 responsibility of the tobacco companies vis-a-vis the
3 product they make. And one of those responsibilities
4 revolves around the issue of addiction, whether or not
5 tobacco is in fact addicting. In that regard, and that
6 regard alone, as far as these remarks are concerned,
7 must you consider this issue, but not on the individual
8 choice of smoking.

9 Okay.

10 MR. HEIM: Let me make that point clear to
11 all of you what I'm saying. What I'm saying is that
12 the plaintiffs have made it their business,
13 Mr. Rosenblatt said it, in his opening statement, that
14 addiction is why people smoke. And that evidence has
15 not been produced in this case, that's not why people
16 smoke.

17 And I'm going to go through that evidence
18 with you when I have a chance.

19 Another issue, flat out an issue, because
20 Judge Kaye is going to tell you it's an issue, is what
21 did ordinary consumers expect about cigarettes when
22 they bought them? That's responsibility. What did
23 they expect about cigarettes when they bought them?

24 And that brings me to a problem that the
25 plaintiffs have had in this case from the day they

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1 filed it, from the very day they filed it, an obstacle
2 that's been in their path since the they day filed it,
3 a mountain of an obstacle that they want to go away,
4 they want you to not see, and that obstacle is
5 warnings. Warnings, warnings, warnings.

6 Now, I'm going to show you the warnings in
7 just a minute, when they were on the packs, and what
8 those warnings said. I want you to look at those
9 warnings. I'm going to tell you how they came about.

10 And I said I'm going to show you those
11 warnings, because -- I think I'm going to show you
12 those warnings, because I've got this new-fangled
13 gadget here that you saw how well I was able to do with
14 trying to just put a simple slide up on the television
15 during the trial. And last night Chris convinced me
16 that I would be more successful at this, so I'm going
17 to try it. If it works, it works; and if it doesn't, I
18 guess I'll just read to you. So here we go, the
19 warnings.

20 Wait a minute. Did it do it?

21 Yeah, okay. Good.

22 Thank you, Chris.

23 Now, the warnings, what are they? Where did
24 they come from? They have been on the cigarettes since
25 1966.

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1 And I know I'm moving away from the
2 microphone, but I think all of you can hear me.

3 1966: Caution, cigarette smoking may be
4 hazardous to your health.

5 1970: The Surgeon General has determined
6 that cigarette smoking is dangerous to your health.

7 1970.

8 Since 1985: Surgeon General's warnings,
9 smoking causes lung cancer, heart disease, emphysema
10 and may complicate pregnancy.

11 Quitting reduces serious risk to your health.

12 And so forth.

13 All of these warnings, they've been there.
14 They've been on the packs. They've been in the
15 advertisements: Warning. Warning.

16 And do you know how they got on there? You
17 heard about it in the evidence. There were hearings in
18 front of the Congress of the United States about
19 whether warnings should go on the packs after the 1964
20 Surgeon General's Report. They were very much
21 publicized hearings. Many, many groups came to
22 testify. The American Medical Association came to
23 testify, other scientific groups testified.

24 And Congress decided that it would draft the
25 warnings themselves. And Congress had a choice of what

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1 kind of warnings that they were going to put on the
2 packs and what kind of warnings would go on the
3 advertisements.

4 Mandatory warnings. Tobacco companies had no
5 choice in the matter. These were going to go on the
6 packs, and these were going to go on the
7 advertisements.

8 This was after 1964. This was after it was
9 well known that there were thousands of chemical
10 compounds in smoke. This was well known about what
11 smoke constituents -- whether there was carbon monoxide
12 in smoke.

13 And Congress had to say: What will be
14 adequate to inform the American people? Do we put a
15 whole bunch of long package inserts with a lot of
16 scientific data on warnings? Or do we find some short,
17 simple, effective way, short, simple and effective way
18 to tell people that this is a product with serious
19 health risks that go with it?

20 And that's what Congress decided to do.
21 Let's send a short, simple message that people will
22 understand, they won't ignore it, because it's simple,
23 short, effective, and it's right there. And that's it.
24 That's it for 30 years, 33 years: Warnings, warnings,
25 warnings, warnings.

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1 In fact, if somebody started smoking a pack a
2 day in 1966 and smoked a pack a day continuously since,
3 they would have had an opportunity to see those
4 warnings on the packs 200,000 times. 200,000 times.
5 And that's not to mention the warnings in the
6 advertisements.

7 But warnings, warnings, ladies and gentlemen,
8 is just the tip of the mountain of awareness
9 information about the health risks of smoking that have
10 been available to consumers, to smokers, since at least
11 the turn of the century. And actually going way back
12 before the turn of the century. Just the tip.

13 This is what people were aware of. They were
14 aware of serious health risk; they were aware that
15 cigarettes can be hard to quit, from friends. And
16 Dr. Ford, who was the only real historian to come and
17 testify in this case, Lacy Ford was here for three
18 days, a real historian. Written books, studied this
19 subject so he could come and testify. He did the work,
20 he prepared, he went back like a scholar and studied
21 it.

22 Friends and family, teachers, public health
23 authorities, news media, popular culture.

24 Later I'm going to cover Dr. Ford's testimony
25 with you about the sources of the information that

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1 smoking has serious health risks, that it can be hard
2 to quit. But this is just warnings at the top of the
3 mountain; the rest of the mountain consists of a huge
4 number of sources: Media, television, magazines,
5 radios, that goes back and back years and years and
6 years and years, generations and generations, from
7 schools, from doctors, from church, and on and on and
8 on. And I'm going to cover that with you later.

9 And maybe this is a good time for me to tell
10 you this. Mr. Rosenblatt made a comment yesterday that
11 you only have so much time, and you have to figure out
12 how to use it. And that's certainly true. And if he
13 thought he had a problem, he ought to try to be on this
14 side of the case and understand how you whack up the
15 time between about five, six, seven lawyers, who all
16 want to come and talk to you about their clients, and
17 the evidence affects their clients, and the other
18 issues in this case.

19 We've done the best we can do on that. And
20 you're going to hear from four or five different
21 lawyers, and I'm going to tell you a little bit about
22 the topics that they're going to cover. We got a
23 little bit of a break, there were actually six
24 companies that were sued and two organizations.

25 Mr. Martinez, who represents Tobacco

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1 Institute, was nice enough to give what he wanted to
2 say to Mr. Reid so he can cover that along with his
3 material, and Mr. Schneider, who represents two
4 companies, Mr. Moss and Mr. Schneider, so that will
5 help out a little bit.

6 We're going to do everything we can to not
7 repeat ourselves, not to cover the same areas, but
8 you'll see that we're dividing up time and trying to
9 all stay within our own time limits, so that we can get
10 this done within the amount of time that was given to
11 us by the Court. So there you go.

12 Let me come back. You have all of this, all
13 of this. And what do the plaintiffs do? Because they
14 have this problem, they have this obstacle, they have,
15 I called it a mountain of awareness. It's a mountain
16 of common sense, that's what it is, it's a mountain of
17 common sense about smoking, that the warnings that are
18 on the packs and in the advertisement is just the very
19 top of the mountain.

20 So what have plaintiffs tried to do with
21 their case from the very beginning? What they've tried
22 to do is simply this, they've tried to tell you that:
23 Well, smokers aren't real people who make decisions
24 about what level of risk they want to take in their
25 lives.

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1 MR. ROSENBLATT: Objection, Your Honor,

2 talking about smokers' decisions.

3 MR. HEIM: Well, Your Honor --

4 THE COURT: Well -- come over here, sidebar.

5 MR. HEIM: This is ridiculous,

6 MR. ROSENBLATT: Don't mumble. I think your
7 argument is ridiculous.

8 MR. HEIM: No --

9 MR. ROSENBLATT: No. Showing a little
10 temper, Mr. calm, cool and collected.

11 THE COURT: Gentlemen, will the jury go in
12 the jury room for a moment.

13 (The jurors exited the courtroom.)

14 (The following p... dir s were had at
15 sidebar:)

16 THE COURT: I'm not going to tolerate this
17 interchange and exchange of comments between counsel.
18 I'm just not going to do it. And it's got to stop or I
19 will declare a mistrial and you can start all over
20 again and spend your lives doing this. I'm just
21 telling you that.

22 MR. ROSENBLATT: Your Honor, it started with
23 Mr. Heim saying "This is ridiculous" to the jury.

24 THE COURT: I don't care who started it. You
25 know better, they know better. Up to this point we've

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1 been very good about interchange and expressions and
2 back and forth, and I thought you understood the
3 importance here and why you don't want to get involved
4 emotionally.

5 I don't want to have to tell you one more
6 time about it. You know because you're a sports fan,
7 it's the guy that throws the second punch that gets
8 caught.

9 MR. ROSENBLATT: Hopefully, not in a
10 courtroom.

11 THE COURT: You know it happens even in a
12 courtroom.

13 MR. ROSENBLATT: Don't provoke me.

14 THE COURT: You're pr -- ir already.

15 MR. MOSS: This is not a prima donna, here.

16 Don't provoke him.

17 THE COURT: Relax.

18 MS. ROSENBLATT: I'd like to go back to show
19 you --

20 I'm sorry. Let's take 10 minutes.

21 (Thereupon, a brief recess was taken at
22 10:04 a.m.)

23 (The following p -- dir,s were had at
24 sidebar:)

25 MR. ROSENBLATT: Your Honor, it said, "Please

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1 come sidebar." The next statement on the screen is

2 "This is ridiculous."

3 MR. HEIM: But, Your Honor, he wants to --

4 THE COURT: The record says: So what have

5 plaintiffs tried to do with their case? What they've

6 tried to do is, they tried to tell you that: Well,

7 smokers aren't real people who make decisions about

8 what level of risk they want to take in their lives.

9 Objection is raised.

10 At this point, the record reflects Mr. Heim

11 says: Well, Your Honor --

12 The Court: Sidebar.

13 Then Mr. Heim says: "This is ridiculous."

14 That started it because I don't have anything before

15 it.

16 The rest says: Don't mumble "ridiculous,"

17 and it goes on and on and on.

18 Now, looking basically at the question

19 itself, I'm trying to get over this issue of assumption

20 of risk and that it's the smokers' fault because they

21 assume the risk of smoking.

22 MR. HEIM: May I explain what I'm trying to

23 do, Judge?

24 THE COURT: Briefly try to explain.

25 MR. HEIM: Let me explain.

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1 THE COURT: You all can be seated unless
2 you're really interested in standing up and arguing all
3 this.

4 MR. HEIM: His opening statement,
5 Mr. Rosenblatt said addiction makes free choice go
6 away. That was part of his opening. During the course
7 of his closing remarks, he talked about people's
8 decision-making process. He said: If someone is not
9 addicted, they throw the pack away.

10 So he put addiction front and center in terms
11 of people making decisions. That is very much involved
12 in the addiction, it's involved in strict liability,
13 because it's what were the ordinary consumers aware of.
14 It's involved in negligence because the issue is a
15 person's decision-making process.

16 So in materiality, it's involved in a whole
17 bunch of issues in this case. I am not trying to prove
18 comparative fault in the case, but it's vital to the
19 defense and has been from day one; and we conducted the
20 defense this way to be able to show that people were
21 aware of the health risk of smoking; that they didn't
22 start to smoke because of advertising, as the
23 plaintiffs have injected in their case; that addiction
24 or nicotine didn't make them continue to smoke; that
25 those were decisions that smokers generally, not any

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1 individual smoker, but smokers generally made not
2 because of conduct of the tobacco company, not because
3 of our advertising and not because of nicotine in
4 cigarettes.

5 And if I'm unable -- my whole closing is
6 predicated on that. If I'm unable to make that
7 argument, you've taken away the closing of the defense.
8 And it's raised in his opening. The Supreme Court of
9 Florida has said closing is reserved for the following
10 things: Issues raised by the pleadings, is the first
11 thing; the second thing is the evidence; the third is
12 inferences from the evidence; and the fourth is a
13 little room for rhetoric. Those are the four things
14 because I memorized them. I'm well within those four
15 things by talking generally about smokers and
16 responsibility.

17 MS. ROSENBLATT: Our position is that's
18 clearly a Phase II issue. It was wrong during opening
19 statement and it's true that counsel did talk about
20 choice and this is an issue of choice and
21 responsibility. And that was not the way it should
22 have been done.

23 And it was something that shouldn't have
24 happened then, but it's clear now, from the way the
25 issues are separated between phases, this is not -- it

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1 is very clear, he can defend and he can talk about what
2 the companies did and what they didn't do. It's coming
3 in as a very limited issue in terms of what were
4 consumer expectations. It's not coming in -- what
5 they're trying to do, what the defense is doing here is
6 trying to say it's all the smokers' fault, it's common
7 sense, it's responsibilities, it's choice, they knew
8 what they were doing. That's clearly -- that's clearly
9 on comparative fault and risk of assumption.

10 MR. MOSS: Let me add to this mix because I
11 think it's important. The plaintiffs have made --
12 talked about on opening throughout the case a failure
13 to warn claim. Your Honor well knows that very
14 relevant to that subject is what do the people that
15 they say should be warned know.

16 THE COURT: That's really not the issue at
17 the moment, it's a secondary issue. We're just talking
18 about choice now.

19 MS. ROSENBLATT: Failure to warn prior to
20 '69, then there wouldn't be any --

21 MR. MOODHE: First of all, Mrs. Rosenblatt
22 concedes that this evidence is relevant to the consumer
23 expectation test. That should end the debate, because
24 strict liability is a -- that is a very tough claim to
25 defend, first of all. That should end the debate. But

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1 it's not just strict liability. Look at the statement
2 one such is that a reasonable person shall consider the
3 same significance in the decision-making process.

4 That goes to your instruction on obvious
5 danger as part of the instructions on negligence.

6 There is no duty on the part of the manufacturer to
7 warn of a reasonable danger, that it should be obvious
8 to or generally known.

9 THE COURT: I understand what you're saying.
10 I'm much more concerned in getting involved in making
11 paramount in the jurors' minds this issue of choice.

12 We get into the addictive nature of nicotine,
13 we're going to have to close the line a little bit.
14 But I don't want it to become a feature of the argument
15 or feature of this trial because that's really a
16 comparative issue trial, and that's going to be Phase
17 II, Stage whatever it is.

18 So only insofar as we've gone with this, just
19 touching the peripheral on the issue of what they knew
20 and whether tobacco was in fact addictive. But I just
21 want you to stay away from the concept of an issue of
22 choice and comparative negligence for Phase I.

23 MR. HEIM: Judge, I will stay away from
24 comparative negligence, and need to be able to say that
25 the issue for them, and I think it's 100 percent fair,

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1 whether their smoking was voluntary or involuntary,

2 they say advertising --

3 THE COURT: As it relates to the addiction
4 issue.

5 MR. HEIM: And the advertising issue, they
6 say advertising caused people -- so I have to be able
7 to use the word "voluntary" or "involuntary," if you
8 won't let me use the word "choice." I have to be able
9 to do it or I can't close the case. It's my whole
10 closing.

11 MS. ROSENBLATT: But the addiction, Your
12 Honor, only comes --

13 THE COURT: Almost everything in Phase I is
14 generic is my biggest problem. And in a generic sense,
15 he would be right. I don't have a problem with
16 generic. We'll go along with this and see as far as we
17 can go, but keep in mind the parameters of avoiding
18 individual choice, individual responsibility, talking
19 generically.

20 MR. HEIM: Maybe I'll tell them that, maybe
21 I'll tell them that I'm not doing anything involving
22 individuals, that my comments are general and generic.

23 MR. ROSS: The issue of comparative
24 negligence, that's a subjective issue for Phase II.
25 This is generic and it's objective, all about what is

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1 the reasonable person -- what would a reasonable man
2 expect.

3 THE COURT: Not a question of what they did
4 with that knowledge; it's what they knew, what they did
5 with it comes later. Let's stay within those confines.
6 And no fighting.

7 MR. ROSENBLATT: I apologize for my role in
8 this.

9 MR. HEIM: Me, too.

10 MR. MOSS: Can I say one other thing on that.
11 If counsel would simply say "Objection," as we were
12 trying to do, and not have a speaking, we'll not have a
13 problem.

14 THE COURT: Hold on.

15 Your side has been guilty of violating the
16 rule a little bit, too, so I'm not going to get into
17 it. The standard position is "Objection," one word,
18 basically "Irrelevant, immaterial."

19 MR. ROSENBLATT: A three-word limit.

20 THE COURT: Or "May I have a sidebar?"

21 MR. HEIM: Although, we're not doing
22 sidebars, remember. Just give me a minute to figure
23 out where where I am.

24 (The sidebar conference was concluded, and
25 the following pr di: js were held in open court, at

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1 10:20 a.m.:)

2 THE COURT: Let's bring the jury out.

3 THE BAILIFF: Bringing in the jury. Jurors
4 entering the courtroom.

5 (The jurors entered the courtroom.)

6 THE COURT: Okay, have a seat, folks.

7 Members of the jury, we've been at this now
8 for what, eight months, ten months for us, or maybe
9 even more. The case has been around since 1994. It's
10 been a long time to get to this point, and I think that
11 there's been a lot of emotion that has been sitting
12 around without any release area. And a little bit came
13 out just a few minutes ago. And I think that's to be
14 expected and that's to be understood under the
15 circumstances.

16 And it should have absolutely no affect on
17 you all, whatsoever. You can understand the parties
18 are very much interested in what's going on. Maybe
19 there will be a trigger that sets off everybody. We
20 put a stop to it real quick, and I think everybody
21 understands the procedure, and we'll go on as normal.
22 So please disregard all that.

23 MR. HEIM: Our apologies.

24 Let me go back to something I was talking
25 about before. I'll go back to this later.

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1 Remember, when I started, I was telling you
2 about these warnings that have been on the pack. And
3 what I forgot to tell you when I was telling you about
4 these warnings is that there's a legal significance to
5 the warnings that Judge Kaye is going to tell you
6 about.

7 When Mr. Rosenblatt was taking you through
8 that verdict form yesterday afternoon, you saw a whole
9 bunch of dates, and you probably looked at them and
10 said: My God, what's all that all about?

11 And at some point, that will get cleared up.
12 But there's another date that's important. And you
13 don't even see it on this screen, but it's an important
14 date and you'll want to note it. And that date is July
15 1st, 1969, because Judge Kaye is going to give you this
16 instruction -- and he was good enough, the Court was
17 good enough to give us his actual words that he's going
18 to use, before we made these remarks to the jury.

19 So I'm going to read you what Judge Kaye will
20 actually say to you about the date July 1st, '69, that
21 has to do with these warnings. And what the Judge is
22 going to say are: You may not base any finding of
23 liability on a determination that after July 1st, 1969
24 one or more defendants should have included additional
25 or more clearly stated warnings on their cigarette

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1 packs or in their advertising.

2 Let me read that to you again: You may not
3 base any finding of liability on a determination that
4 after July 1st, 1969 one or more defendants should have
5 included additional or more clearly stated warnings on
6 their cigarette packs or their advertising.

7 And those are the Court's words.

8 These warnings, these warnings are adequate
9 -- Congress made that decision -- to inform smokers
10 after July 1st, 1969, of the health risks of smoking.
11 And that's why no additional warnings or more clearly
12 stated warnings are necessary.

13 That's the doctrine of preemption that you've
14 heard talked about from time to time, when a lawyer
15 would get up and say, "Preemption." And you'd all
16 think: What in the world is that?

17 I just told you what it is. It's called
18 preemption. Congress made that decision.

19 Now, there's the plaintiffs view of the
20 evidence and the defense view of the evidence, and
21 that's no surprise to you after having been here for
22 eight months.

23 The plaintiffs view of the evidence is that
24 smoking isn't voluntary, as a general matter. And when
25 I make these comments, I'm not talking about any

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1 individual smoker. I want to make that clear. That's
2 not for this phase of the case. We're not talking
3 about any individual smoker. That's for some other
4 time.

5 We're talking about -- I'm talking generally
6 and generically about smokers. But generally and
7 generically, they say the smoking, smoking isn't
8 voluntary, it's involuntary.

9 Their view of the evidence is that smokers
10 are pawns who are brainwashed into smoking by pictures
11 of herds of horses, or a cowboy, or attractive people.
12 Then what happens to them after that? Well, they're
13 held in the grip of a drug nicotine that's as powerful
14 or more powerful as heroin or cocaine. And for that
15 reason people continue to smoke. That's plaintiffs'
16 view of the evidence.

17 But it gets more than that, it's even more
18 than that, because plaintiffs want that mountain of
19 awareness, what ordinary people expected about
20 cigarettes and have expected for decades, generations,
21 generations, they want that to go away. They want that
22 to disappear.

23 So what have they done? You've heard it over
24 the last two days, to move you away from whether
25 smoking is voluntary, from what ordinary consumers

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1 expected about the health risks of smoking over the
2 course of these many, many years.

3 They've made charges, they've made charges
4 about the defendants' conduct. And they've shown you a
5 memo here or evidence of a meeting there. 50 years'
6 worth of documents, out of 50 years' worth of documents
7 written by tens of thousands, maybe hundreds of
8 thousands of employees by six companies and two
9 organizations over 50 years.

10 And they find what they can in there and they
11 say: Look at that. Look at this. Maybe this mountain
12 will go away. Because that's exactly what plaintiffs'
13 evidence tries to do: Divert you from this.

14 And they say: Well, look, you know, there
15 was evidence in this case, there was this document.

16 Well, there were millions and millions of
17 documents that the tobacco companies made available in
18 discovery, in pretrial discovery, in the ordinary
19 process, Dr. Carchman and I think others testified,
20 millions of documents for anybody to look through,
21 plaintiffs' lawyers to look through, covering every
22 conceivable subject.

23 And it's not just documents, it's indexed,
24 indexed like a library; go in and find everything there
25 is on advertising, everything there is on nicotine.

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1 All of these documents have been made available,
2 covering 50 years.

3 And I ask you, when you look at these things,
4 when you look at the events that get pointed to by the
5 plaintiffs, I'd like you to ask yourself some
6 questions. First question is: Did it happen the way
7 the plaintiffs say it happened?

8 Think through whether it happened that way.

9 Did they prove that their version of the
10 facts was correct?

11 Did this opinion, written by this scientist
12 in 1974, ever go anywhere? Did anybody ever do
13 anything with it? Did it count for anything?

14 Did the company take any action based on the
15 memo, or the thought conveyed in the memo, or the
16 meeting, or the opinion? Did the company take any
17 action? What did the company do?

18 Actions count. Actions count. I ask you to
19 think, what did the companies actually do over these 50
20 years? We're going to spend time telling you and
21 showing you in the evidence what the companies actually
22 did as opposed to what one person wrote in '74, another
23 person wrote in '82, somebody else wrote something in
24 '63.

25 What did the companies do? Did anybody pay

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1 any attention to that?

2 And then, after you've figured it out, after
3 you decided what did the companies do, you have to make
4 a judgment. Did that make any difference? Whatever it
5 is, whatever, when you decide what the -- what
6 difference did it make?

7 Did it make any difference with regard to
8 what people knew about the health risks of smoking?

9 Did it make any difference about why people
10 started to smoke?

11 Did it make any difference as to why people
12 continue to smoke?

13 Or is it a diversion from those very
14 principal issues in the case, what ordinary people
15 expected and why people smoke?

16 Does that particular thing help you on that
17 subject? Does it make any difference? Does it make
18 any difference?

19 And when you look at it that way, your plain
20 old common sense is going to tell you that it didn't.

21 Because there's overwhelming evidence,
22 overwhelming evidence, that smokers have been aware of
23 the serious health risks of smoking for much, much
24 longer than any of us in this courtroom have been
25 alive.

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1 And that they've known that there are serious
2 risks, and that it can be hard to quit. And that's
3 what they expected when they were deciding when smokers
4 bought cigarettes, what they expected about those
5 risks.

6 People, people have to look at themselves and
7 say: Generally, what level of risk do I want to have
8 in my life? It's a fair thing to do, it's a fair thing
9 to do, what level of risk am I willing to have in my
10 life, what level of risk when I see the warning?

11 MR. ROSENBLATT: This is an objection, Your
12 Honor, personal issue.

13 THE COURT: Hold on.

14 I'll overrule it at this point, but you're
15 getting close. I think I understand generically what
16 you're talking about. I do understand what the
17 objection is.

18 We're sort of narrowing the gap and I really
19 don't want to get to that point. But be careful.

20 MR. HEIM: All right.

21 Now, what I want to talk to you about is the
22 efforts to divert you from those issues that I talked
23 about earlier, whether smoking is voluntary, whether
24 people are aware of the health risks, whether people
25 generally know that when they smoke.

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1 And what I've done -- see if I can go back to
2 this, thought I'd be well past it by now, but let's
3 see.

4 That part doesn't work. Okay. Now I've got
5 it working.

6 I told you that actions count. And actions
7 do count. People count, too. People count. And what
8 plaintiffs are asking you to do is to give them --
9 well, at some point, put them in a position to make a
10 claim for damages, the case is about money.

11 And they want, as you were told yesterday,
12 not just damages for the health consequences, diseases
13 that they say they got from smoking --

14 MR. ROSENBLATT: Objection. This is not an
15 issue in this, individual, individual damages.

16 MR. HEIM: I didn't say it was, Judge. He
17 talked about punitive damages.

18 MR. ROSENBLATT: Parameters are clear.

19 THE COURT: Yes. I'll sustain that
20 objection. Stay away from individuals.

21 MR. HEIM: Well, I am.

22 I told you the case is about people. What
23 kind of people? Well, the people in the class that are
24 the plaintiffs; the companies are about people, too.
25 The companies are about Brad Scott, they're about Cliff

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1 Lilly, Dave Townsend, Lynn Beasley, Alex Spears; all
2 the people that came and testified. They're about, the
3 companies are about tens of thousands of employees,
4 shareholders who own the companies, people who invested
5 in them. So there's people on both sides of this
6 equation. People.

7 And you have seen those people come into the
8 courtroom. And we're going to cover with you some of
9 what they said and what they did. And I'm going to
10 cover some of it with you this morning.

11 But how do you get moved away from your
12 common sense observation that the health risks of
13 smoking were known, people knew it and expected it,
14 expected that cigarettes have risk, how do you get
15 moved away from the fact that, as Mr. Rosenblatt said
16 yesterday -- I'll quote him: Nobody held a gun to
17 smokers' heads.

18 That's what he said. He's right. Nobody
19 forced smokers to smoke. How do you get moved away
20 from that?

21 Here's how you do it. You make this kind of
22 an argument: Tobacco companies erased common
23 knowledge.

24 Now, I call that avoidance strategy number
25 one, diversion number one: The tobacco companies

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1 erased common knowledge.

2 I've already told you that for over 30 years
3 the warnings have been on the pack.

4 But well before that, schools, government,
5 newspapers, magazines, doctors, health care
6 professionals all told people about the risks of
7 smoking.

8 And how do you know that? How do you know it
9 from the evidence in this case? Well, there are polls
10 -- and we're going to cover those polls -- but there
11 have been polls going back to the '50s, '60s, '70s,
12 '80s. And people have been asked -- people asked about
13 how they feel about smoking, the health risks of
14 smoking.

15 And, ladies and gentlemen, what tobacco
16 companies said or didn't say, did or didn't do in the
17 face of what was being said by schools, by churches, by
18 television, by radio, by Surgeon Generals, by doctors,
19 health classes, hygiene classes, biology classes,
20 school curriculum, Florida Health Notes, what tobacco
21 companies said, what tobacco companies knew couldn't
22 have made the slightest difference against a tidal wave
23 of public common knowledge. It would have been a
24 sandcastle against a tide of public common knowledge.

25 So that's avoidance strategy number one, the

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1 tobacco companies made some comments and somehow or
2 another that affected common public knowledge, could
3 not possibly have.

4 Avoidance strategy number two, diversion
5 number two, advertising made people start smoking. And
6 it's worse, because it's not that advertising made
7 people start smoking. That's part of what plaintiffs
8 have said in this case.

9 But what they've really said is that the
10 tobacco companies, Philip Morris, Reynolds, the others,
11 Lorillard, the tobacco companies set out deliberately
12 to try to get kids to start smoking, that that was
13 their intent and that was the effect, and you know
14 what, that's a vicious charge, that's a vicious charge,
15 it's a reprehensible, vicious charge. And it isn't so.
16 It's been proven not to be so in this courtroom.

17 The only real advertising expert to come into
18 the courtroom and testify, somebody who has studied it,
19 researched it, written textbooks that are used right
20 down the road at the University of Miami, the only true
21 national expert on this subject came in and told you it
22 just isn't so, Richard Semenik.

23 Lynn Beasley told you it isn't so. She said:
24 It isn't so because we didn't do it, wouldn't do it and
25 it wouldn't make business sense to do it, anyway.

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1 Jim Morgan, the former president of the
2 company -- and by the way, by the way, the president of
3 the company during most of the time that this lawsuit
4 was pending, you heard the remark we didn't bring CEOs,
5 Jim Morgan was the CEO during '94, '95, '96, most of
6 the time this lawsuit was pending. And he came in here
7 and he told you, it just isn't so.

8 You remember, he got upset. He said, you
9 know: Mr. Rosenblatt, I was there, you wasn't, you
10 weren't. We don't do that.

11 A vicious charge. And it's there to get you
12 mad. It's there to get you mad. That's why it's
13 there. Push your button, get you mad.

14 And you should get mad. You should. You
15 should get mad about the accusation and the fact that
16 it wasn't proven.

17 Number three, another avoidance strategy,
18 smokers can't quit. Or they have a very hard time
19 quitting, or most smokers can't quit.

20 Well, some do have a very hard time quitting,
21 no question about that. Some do. But the idea that
22 smokers can't quit is absolutely wrong. I can give you
23 50 million reasons why it's wrong. That's how many
24 people have quit smoking in the United States.

25 Those aren't tobacco company statistics, they

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1 come from the United States government. That's who
2 gives you that statistic. 50 million have quit and
3 quit for good. 50 million. 50 million reasons to show
4 you that smokers who want to quit, make up their mind
5 that they're going to quit, can quit.

6 And another thing about it that I'm going to
7 show you in the evidence when we cover this issue of
8 addiction, nicotine, nicotine is a drug; it is a drug
9 that has mild pharmacological effects. It is not the
10 whole ball game, it has mild pharmacological effects
11 and it is a drug. It helps you relax; it helps some
12 people concentrate; but it is a far cry from heroin or
13 cocaine.

14 And I suggest to you, ladies and gentlemen,
15 that anybody, anyone who's ever had a friend or
16 relative suffer through dealing with heroin or cocaine,
17 battles his or her way through heroin or cocaine, knows
18 the absurdity of comparing nicotine with heroin or
19 cocaine.

20 Smoking is a behavior, it's a behavior,
21 people smoke because they like to smoke. They like the
22 taste; they like the way it feels; they like watching
23 the smoke; it relaxes them; they like the part that --
24 they like the part of the ritual of smoking.

25 And the label that you put on it, whether you

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1 call it a habit, you call it an addiction, you call it
2 a dependency, doesn't obscure the 50 million facts that
3 smokers quit when they want to quit.

4 And we will show you the evidence that
5 nicotine does not make smoking involuntary, does not
6 make smoking involuntary. And you can't, based on the
7 evidence about nicotine and the evidence about smoking,
8 say that tobacco companies made people smoke, because
9 that just isn't so.

10 Number four avoidance strategy: Risk factor
11 is a lie.

12 Now, let me tell you what's going on here,
13 it's very clever, all the Public Health Organizations,
14 it's true, they all say smoking causes disease, smoking
15 causes lung cancer, smoking causes heart disease.

16 And what has the position been of the tobacco
17 companies? They've said: You know what, it's
18 perfectly fine for you to say that; tobacco companies
19 have said that. It's perfectly fine for you to say
20 that.

21 And even more, they agree that there's lots
22 of statistics on smoking and disease and, in
23 particular, heart disease, particularly lung cancer.
24 Actually the statistics on heart disease are actually
25 very, very small on heart disease.

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1 The risk factor you heard about, the risk
2 factor for heart disease is less than 2, which experts
3 say is insignificant. And there are many, many risk
4 factors for heart disease. But the tobacco companies
5 say: Great, say it, it's fine. You're public health
6 people. Go ahead and say it. But the right word to
7 describe it in science is risk factor.

8 And the plaintiffs say: No, you have to say
9 it our way or you get punished. It's like a heresy
10 trial. Say it our way or we'll punish you. Say it the
11 way the Public Health Organizations want you to say it.

12 Now, none of them have ever said that risk
13 factor -- calling smoking a risk factor for heart
14 disease is a lie, because it isn't.

15 And several of their own witnesses got up on
16 the witness stand and said: Yeah, when I'm talking to
17 a scientific group, I use the term "risk factor,".

18 Dr. Whelan said that, and there's another one
19 who said that: When I'm talking to a scientific group,
20 that's the term I use, "risk factor."

21 But because tobacco companies say
22 scientifically we are accurate in calling it a risk
23 factor, they say: Punish them. They're not using the
24 right words. A diversion.

25 Mr. Reid is going to cover this subject with

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1 you, the history of the science and health issue. And
2 he's also going to take you through The Frank
3 Statement, along with Mr. Moodhe, why the people who
4 wrote The Frank Statement -- and I want to tell you,
5 the actual evidence, there's one piece of evidence.
6 Think about defending a case that goes back 50 years,
7 think about that.

8 And plaintiffs come up and they make charges,
9 and you say: How in the world do we go back 50 years
10 and get the people and get them to say 50 years ago
11 that what they said they believed to be true?

12 Well, there's a piece of evidence,
13 fortunately, preserved from 50 years ago that shows you
14 that when those people signed The Frank Statement, said
15 what they said they believed every word of it. And
16 you're going to see that.

17 Now, Mr. Reid is also going to cover with you
18 what the companies have done over the last 50 years,
19 what the voluntary hard work that the companies have
20 done to do their best to make smoking as safe as it can
21 be made.

22 Now, another risk factor, issue -- another
23 issue is, what have responsible scientists said on this
24 point? And the presentation you heard over the last
25 two days would make you think that the people who came

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1 on to this witness stand weren't responsible
2 scientists, that somehow they were, quote, connected to
3 the tobacco industry.

4 Well, in today's climate, it takes some guts
5 and takes some courage for a doctor to get up on that
6 witness stand and say: You know what? They happen to
7 be right, they happen to be right. It may not be
8 popular, it may not be politically correct, but they
9 happen to be right. And I'm willing to tell you that
10 I'm right, that they're right, as a matter of science,
11 they're right.

12 Number five, CTR is a sham. CTR is a sham.

13 Well, now, that got backed off a little bit
14 yesterday. That's what was said in the opening; but
15 over the last two days, it's: Well, maybe it's not
16 entirely a sham, it's partially a sham, it's mostly a
17 sham. Yeah, they did some good work, there were some
18 good researchers that got some money, but it's mostly a
19 sham.

20 Well, CTR is far from a sham, and its work
21 made enormous contributions, absolutely enormous
22 contributions, to science and to developing an
23 understanding of the relationship between smoking and
24 disease.

25 Mr. Moodhe is going to cover that subject

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1 with you in some, in some depth as to what CTR did, how
2 it did it. And he'll remind you of what Dr. McAllister
3 said and what Susan Oparil said, who was a grantee and
4 a former recipient of a grant of the American Heart
5 Association.

6 Number six, nobody but the tobacco companies
7 knew about the science of nicotine; nobody but the
8 tobacco companies knew about smoking and disease; it
9 was something they had hidden in their files.

10 Think about how preposterous that is. Think
11 about it.

12 Dr. Richmond, the very first witness in this
13 case, said something that was interesting. He said:
14 No issue -- I'm paraphrasing his exact words -- but no
15 issue has been studied as much over the last 35 years,
16 no public health issue, as the issue of smoking and
17 disease.

18 And that has to be true. And that goes way
19 back more than 35 years.

20 It's not a hard thing to study. Tobacco
21 grows in the field. You pick it up; you put it -- you
22 burn it, and you study what comes off it. So it's been
23 studied by health institutions, by hospitals, by
24 universities, by disease centers.

25 And Mr. Schneider will show you and explain

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1 to you and prove to you from the evidence that the
2 tobacco companies didn't know anything more about the
3 science of smoking and health, the science of nicotine,
4 the issue of addiction, than was widely known in the
5 public health community and among scientists generally.

6 Nobody was hiding anything that wasn't
7 perfectly well known. Wasn't being studied, that
8 people didn't know about. And the idea that it was is
9 simply not supported by the evidence, because there's a
10 huge body of scientific literature, and I'm sure Dr. --
11 I'm sure Mr. Schneider is going to talk to you about
12 Dr. Siegel's testimony about the fact that these things
13 weren't known; because that testimony is just
14 contradicted by scores and scores and scores, tens of
15 thousands of articles by the scientific community about
16 the relationship between smoking and health.

17 The science of it down to crossing the t,
18 dotting the i, as good as anybody could do it was being
19 done outside the tobacco companies, not just inside.
20 The tobacco companies were working, they were doing it,
21 they were trying to make this product safer.

22 But it was being done all over the world by
23 the best scientists. And the idea that the tobacco
24 companies were hiding something that scientists
25 generally didn't know is just not right. It's not

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1 right. It's not supported by the evidence.

2 And then there's the last one that I picked
3 out. And this one, nicotine manipulation, you've heard
4 this term "nicotine manipulation." Great term.

5 Now, if the idea -- let me say this to you:

6 If this idea is that tobacco companies took nicotine
7 and manipulated it, that is increased it, boosted it,
8 spiked it to get people addicted, that would be a
9 terrible thing.

10 That's a vicious charge. That is really a
11 vicious charge. That's a reprehensible charge and it
12 didn't happen. And they didn't prove it.

13 The idea that we -- you know, the term was
14 used, "spiked nicotine," and I'm sure -- I'm going to
15 come to it when I talk about Dr. Uydess -- but I'm sure
16 that it wasn't welcome news to the plaintiffs when
17 Dr. Uydess got up on that witness stand and said:
18 Philip Morris wouldn't do that.

19 But that was the allegation. We spiked with
20 nicotine, we used pH, used -- what's the charge? --
21 ammonia, to increase the pH of smoke so it will be more
22 bioavailability. That's what they said right in the
23 openings. Chemists and scientists will come here into
24 this courtroom and tell you: This is what was said.

25 This is the commitments that the plaintiffs

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1 made: Chemists and scientists will come here into this
2 courtroom and they will tell you that tobacco
3 companies, what they do is they use ammonia, and it
4 increases the pH of smoke.

5 And then their third witness, I think it was,
6 came into the courtroom, this is what he said, third
7 witness. What did he say?

8 Dr. Benowitz: And my question to you,
9 Doctor, simply, you have not seen any empirical
10 evidence, any factual data, that shows that the ammonia
11 used by Philip Morris in making its commercial
12 cigarettes has any effect on the pH of smoke?

13 That's correct.

14 Touted to you yesterday as the leading
15 authority, a guy who has done the research, guy who has
16 done the work. What does he say?

17 I haven't seen it. And even more, look at
18 that testimony. And it is correct, based upon your
19 knowledge, that this theory, theory now, the theory
20 that you can even do this -- so now it's a theory, and
21 it is correct based upon your knowledge that the theory
22 has not been scientifically proven, correct? The idea
23 that you can get there.

24 Well, we need to talk specifically about
25 what's meant by the bioavailability, if you mean

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1 affecting the absorption rate, which is the absorption
2 of nicotine in the body.

3 And I said: That's what I mean.

4 And he said: That's correct.

5 Now, compare that to what was said about it.

6 Not proven. Not proven. In fact, disproven. It was
7 disproven.

8 Now, a couple minutes ago -- see if I can
9 blank this out.

10 A couple of minutes ago I mentioned
11 Dr. Siegel. And that brings me to wanting to talk to
12 you a few minutes, before I get into some specifics,
13 one of the things I'm going to do before my time is up
14 this morning is I want to talk to you about some of
15 those documents you saw yesterday. Because I think I'm
16 going to be able to show you, and you'll conclude, when
17 I do that, that documents aren't always what they seem
18 to be.

19 But I want to talk to you about evidence.

20 Mr. Rosenblatt said a few things about evidence, what
21 evidence is and what evidence isn't, and about how you
22 should look at believability.

23 The judge is going to give you an instruction
24 about how you approach this subject of the
25 believability. He's going to tell you essentially that

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1 believability is up to you. He's going to say it's up
2 to you.

3 The evidence consists of the testimony from
4 the witness stand that you believe, and it's up to you.
5 And it consists of documents and exhibits, and it's for
6 you to decide their significance. It's up to you.

7 You can think they're very significant, you
8 can think they're not very significant. You can credit
9 them a lot or you can say it didn't make any
10 difference. Totally up to you. You make that
11 decision.

12 And you know, let me tell you something else,
13 questions without answers don't mean anything, don't
14 mean anything. The way the question is put to the
15 witness, the tone of voice, the loudness, the not
16 loudness, the whatever, however the question is put,
17 sarcasm, doesn't mean anything without the witness'
18 answer. That's what you're looking for. Without the
19 answer, the question is just lawyer talk.

20 Now, let's talk about expert witnesses. The
21 job of an expert witness, what is it? Well, it's there
22 to help you understand a particular field with which
23 you may not be all that familiar. That's what expert
24 witnesses are there to do. That's an expert's job.

25 And the Court is going to say: You can

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1 evaluate expert witnesses same way you evaluate any
2 other witness, you can believe them or not believe
3 them. You can say: I believe them a little, or I
4 believe them a lot, or I believe down the middle. Can
5 you do any of those things?

6 And you can take into account any interest
7 that that witness may have in the outcome of the case.
8 Now, what does that mean: The interest of the witness
9 in the outcome of a case?

10 Now, yesterday you heard: Well, you ought to
11 think about whether a witness received a fee.

12 An expert witness, when that witness
13 testified, a fee that a witness receives for doing the
14 work that's necessary to prepare to come into this
15 courtroom and give you an expert opinion based on the
16 research that the witness did, the work that that
17 person, he or she, did in order to get ready to tell
18 you about that particular field of knowledge.

19 Well, you can look at that. That's something
20 that you can look at. But, you know, it's a two-way
21 street when you do that. It's a two-way street.

22 This is an important case, you should expect
23 that, before anyone gets up on that witness stand and
24 says "I'm an expert, I'm testifying as an expert," and
25 tells you about their work and gives you an opinion,

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1 you should expect that they did their homework first.

2 You should expect that they prepared; they did their
3 research, they actually looked at the issue; they
4 looked at the scientific underpinnings of it, whether
5 it's toxicology or advertising; they went back and
6 looked at the literature; they reviewed it all.

7 And if somebody did all that work to come
8 into the courtroom to give you the benefit of their
9 opinion, most people would say they're entitled to a
10 fee for that, whether it's for this case or a whole
11 bunch of cases.

12 And I said, you can't have it both ways.

13 Reference was made to a witness, I think it was
14 Dr. Thomas maybe or Dr. Semenik, maybe both, who spent
15 a large number of hours preparing. Dr. Thomas reviewed
16 the literature going back 50 years. Dr. Semenik said,
17 "I spent a thousand hours looking at the issue of the
18 effect of advertising."

19 And you know what, if they had spent five
20 hours, what you would have heard is an argument: How
21 can you credit that testimony? The guy didn't even do
22 any homework. He didn't do the work. He didn't
23 prepare. Why should you credit that?

24 So you can't have it both ways.

25 And I think it's fair for you, when you're

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1 considering the interest of a witness in a case, to
2 look also at whether or not that witness has an agenda,
3 because that's part of an interest in the case.

4 Is the witness so committed, for example, to
5 the antismoking movement, so vigorous in opposition to
6 smoking, for what he may believe to be perfectly good
7 and are perfectly good health reasons, but is he so
8 vigorous in his commitment to stopping smoking,
9 stamping out smoking, the war against smoking, that
10 that vigor gets in the way of a fair examination of the
11 facts? A fair examination of the facts.

12 A witness has every right to express an
13 opinion. But you have the right to reject an opinion
14 when the opinion doesn't come from a fair examination
15 of the facts and a fair and objective reasoned look at
16 the evidence that is the subject of what the person's
17 talking about.

18 Yesterday you heard an expression that: Yes
19 -- I forget which one it was, maybe it was Dr. Blum,
20 field commanders, field commander in the war against
21 smoking, Field Commander Siegel, Field Commander Blum,
22 they're field commanders in the war against smoking.
23 That's fine, but you know what, one of the earliest
24 casualties in a war is frequently truth. You have a
25 right to consider that, you have a right to consider

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1 that as well. What motivated the opinion? Was it win
2 the battle at all costs? Expert witnesses are supposed
3 to provide you with a fair examination of the facts
4 that they know about. They're supposed to give you a
5 fair examination of the facts that they know about. So
6 consider whether a witness when he got up on that
7 witness stand was giving you that or whether he was
8 being a field commander in the war.

9 And when you do that, when you go back and
10 look at each witness' testimony you're going to
11 conclude that on more than one occasion a number of the
12 plaintiffs' witnesses crossed over the line from giving
13 you a fair examination of the facts that they knew
14 about to just wanting to win the war.

15 Now, I'm going to go on now and talk about
16 documents. So maybe this is a good time to take a
17 morning break if you want to.

18 THE COURT: If you'd like. All right, let's
19 take our break, the same rules will apply, do not make
20 any decisions, do not discuss the case.

21 (The jurors exited the courtroom.)

22 THE COURT: All right. The Court will be in
23 recess.

24 (A recess was taken from 11:05 to 11:20 a.m.)

25 THE COURT: Have a seat, folks.

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1 Can I get some idea of your time schedule?

2 MR. HEIM: For the day?

3 THE COURT: I mean for your part of this, so
4 we know.

5 MR. HEIM: Well, it's a little hard to
6 calculate, because we got broken up this morning.

7 My plan had been to finish in less than two
8 hours. That had been my plan.

9 THE COURT: Well, I was looking to see
10 whether you were going to be finished before lunch.

11 MR. HEIM: Probably not.

12 THE COURT: Okay. I figured the lunch area
13 is in the area between 12:00 and 1:00, someplace in
14 there.

15 MR. HEIM: I might be able to finish, I'd
16 like to try to finish it before lunch.

17 THE COURT: Two hours would give you pretty
18 close to 1:00.

19 MR. HEIM: I won't be two hours more, Judge.
20 I meant two hours in total.

21 THE COURT: Let's figure we take our lunch
22 after your presentation. That will be a nice easy
23 break.

24 Bring the jury out.

25 (The jurors entered the courtroom.)

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1 THE COURT: All right, be seated, folks.

2 You may proceed.

3 MR. HEIM: All right. I'm going to turn now

4 to the documents. And yesterday we spent a whole

5 afternoon on documents. And I think there's about, in

6 total, all together, about 1200 documents in evidence.

7 That's a huge amount of documents that are in evidence

8 in this case.

9 And, as I told you this morning, they're
10 selected from tens of thousands, hundreds of thousand,
11 millions of documents. There a huge universe of
12 documents. And we've got about 1200 in this case.

13 They're written by six companies, two
14 organizations. They're kind of spread out from the
15 1950s all the way up to the late 1980s, so you've got a
16 lot of different people writing a lot of different
17 documents over a lot of different years.

18 You'd expect that. I mean, they're
19 companies, they're big companies, so you're going to
20 expect that.

21 Let me tell you about the documents. Now,
22 are there some documents in evidence in this case that
23 go back years and years, that when you read them today
24 really sound dumb and sound stupid, and there are even
25 some documents that sound wrong and that say wrong

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1 things, express a wrong thought, something that any of
2 us would read and say: That was -- that's a bad idea.
3 That's a bad thought. That's a bad idea.

4 Sure, there are some documents like that.
5 Out of countless thousands of documents, if there
6 weren't some documents like that, anyone might be
7 suspicious: Why wouldn't there be? Is everybody
8 perfect over 50 years?

9 So, yes, there are some documents like that.
10 But also some, there are also some documents, and I'm
11 going to show you this, that you were shown yesterday
12 that were misrepresented to you -- that's the only word
13 that I can use for it -- that were distorted, that were
14 taken out of context.

15 And you were saying: Look at this, and from
16 this, believe this and it just isn't so. And I wrote
17 them down as fast as I could, as I was going through
18 them. And I'm going to pick out some of them and go
19 through them with you this morning.

20 My time doesn't let me go through the 50 or
21 70, or whatever, were shown to you yesterday afternoon,
22 but when you look at the documents generally I ask you
23 to do three things, this is what fair -- because you're
24 after fairness. Everybody wants to be treated fair.
25 And I know you want to treat everybody fair, so you're

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1 after fairness.

2 So ask yourself this: One, does the document
3 say what you were told it said? And that's especially
4 true where you were shown a blow-up of one page of the
5 document, but you weren't shown the whole document. Is
6 there something else in the document that bears on what
7 you were shown? That's being fair.

8 Is it in context? The second thing I ask you
9 to look at. Is it in context? Are there other
10 documents that, in fairness, you need to consider in
11 connection with the document that you were shown,
12 because it sheds light on how you're being asked -- the
13 conclusion you're being asked to draw.

14 For example, if a scientist at a company says
15 X is right, and the argument is made from there:
16 Ladies and gentlemen of the jury, this company said X
17 is right, but if there are two other documents from
18 other scientists that say Y is right, not X, it's not
19 fair to show you X and not show you the other
20 documents, too. That's just not being fair.

21 You know, I gave an example in the -- earlier
22 I gave an example, I guess it was in the opening, about
23 taking documents out of context, and you know, I
24 apologize to those of you who aren't football fans, but
25 if you were to look at Dan Marino's career, and you

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1 just looked at newspaper columns about the bad games he
2 had, you'd come to the conclusion that he was a pretty
3 bad, lousy quarterback.

4 And anybody who has been from Miami for a
5 period of time is going to say: That's not fair. You
6 only looked at part of the story. You have to look at
7 the whole story, because when you look at the whole
8 story, you see something different.

9 That's being fair.

10 Then the last thing I ask you to consider
11 when you're looking at documents, because, you're
12 right, you're going to have this whole mountain of
13 documents in the jury room, a lot of documents, 1200 --
14 maybe not 1200, the Judge will decide which ones you
15 have and which ones you don't have -- but ask whether
16 or not the document was ever shown to a witness and the
17 witness was asked about it.

18 Now, I brought into this courtroom and put up
19 on the witness stand the president of the company
20 during most of the time that this case was pending. I
21 brought the head of research and development. I
22 brought the senior research fellow, Dr. Lilly, at the
23 company, who had been at the company for 35 years.

24 How many of these documents from Philip
25 Morris was he shown, and said: Dr. Lilly, can you tell

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1 us about this? Can you explain it? Can you put it
2 into context?

3 How many of them was he shown of the
4 documents? And I don't know what documents plaintiffs
5 are going to use.

6 Is that fair to just argue later what the
7 document means and not give the witness, who's been
8 there for 35 years, a chance to talk about it?

9 You wouldn't have known if Cliff Lilly
10 wouldn't have come down here and just happened to make
11 a comment during the course of his testimony that:
12 Yeah, Dr. Dunn at Philip Morris thought that nicotine
13 was everything, was the whole ball game, but I
14 disagreed with Dr. Dunn, I told him that a lot. Cliff
15 Lilly got -- I told you that.

16 And you will know that. So fairness.
17 Fairness.

18 Now, I want to go to some of these documents,
19 because I just picked what I could pick in a short
20 period of time. And I tried to pick some to illustrate
21 each of the points I just made about misrepresenting
22 something, context, other documents, so that you'd have
23 some sense for what I'm trying to say about this.

24 Now, I don't have a -- talk about low tech, I
25 don't even have a board for these, because I just did

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1 them as I got them. So I just pulled the document
2 itself.

3 And the first document I want to tell you
4 about is this document here. It's No. 1623. It's from
5 1959 and it's called A Study of Attitudes Towards
6 Cigarette Smoking, by the Roper Organization.

7 This one here. 1623. Plaintiffs Exhibit
8 1623.

9 Now, I couldn't see what you were being
10 shown, obviously they couldn't put the whole document
11 up on a board, so I didn't see, sitting where I was,
12 what page you were shown. But I could read the
13 transcript, that I could do. And I know what was said
14 about this document. And what was said about this
15 document was: This document shows that in 1959 only
16 one percent of people believe smoking caused lung
17 cancer.

18 That's what this was represented to be. And
19 that's an absolute distortion of this document. It's
20 not true. 1 percent believe that -- 99 percent didn't
21 believe it.

22 Now, when you heard that, must have surprised
23 you a little bit because you had seen some polls back
24 in the 50s that had said the opposite. You were shown
25 them in evidence during the case, so it must have

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1 surprised you. It sure surprised me.

2 And I'll bet you thought the question was

3 something like this: Do you believe smoking causes

4 cancer?

5 Right? I mean, if somebody says only 1

6 percent of people believe that smoking caused cancer,

7 you probably thought that was the question. Or maybe:

8 Does smoking cause cancer? Because that would be a

9 question that would get an answer whether people

10 believed that smoking caused cancer or not.

11 Wrong, wrong, wrong. That was not the

12 question. Actually, what happened here, very

13 interesting, you turn to Page 5 of this document and

14 you find out what happened here.

15 And these were interviews that were

16 conducted. And the interviewer would start out with a

17 question, and then tell people -- and the question goes

18 like this, I'm reading from the document. Here is the

19 start of the first sentence: And when I stop talking,

20 you just finish it with whatever pops into your head,

21 with whatever pops into your head.

22 This was 40 years ago, in 1959. And the

23 question then that was asked was not: Does smoking

24 cause cancer?

25 The question was: The trouble with

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1 cigarettes is that they -- and then the person said
2 whatever popped into their heads, whatever popped into
3 their heads.

4 Some people said: They cough too much. Some
5 people said: They burn my clothes. Whatever popped
6 into their heads at that moment when the interviewer
7 said that is what was said. It was a fill-in-the-blank
8 question.

9 When you look at the actual results, they're
10 different. Even with that, 22 percent of the people
11 gave answers that fell into the category that they're
12 bad for you.

13 Now, did they specifically mention cancer?
14 No, but so what? They're bad for you. 24 percent
15 answered that they're habit-forming. They gave answers
16 like that. First thing that popped into their head.

17 So the fact that the first thing popped into
18 your head when somebody said to you, "The trouble with
19 cigarettes is," and he said, "They're a bad habit,"
20 like a lot of people said, if the witness had said,
21 "Well, how about, do they cause cancer?" the person may
22 very well have said "Yes, of course they do. Of course
23 they do."

24 They weren't given that chance. First thing
25 that pops into your head, and still 22 percent say

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1 they're bad for you, the very first thing. And yet
2 from that, from that they say, you should -- you jump
3 to the conclusion that only 1 percent of people, only 1
4 percent of people thought that smoking caused cancer,
5 they weren't asked the question. Is that fair? Is
6 that fair? You should expect fairness, we should
7 expect fairness.

8 "The trouble with wine is..."

9 "Costs too much." "Too many calories."
10 "Hard to find." And "Maybe you can get drunk if you
11 drink too much."

12 But unless you ask the question, you don't
13 know what the answer is. That's just not being fair
14 with the document. It's not being fair. That's what I
15 mean about look at the way documents are being used
16 here.

17 You know, somebody that draws a conclusion
18 like that from a document like this and says: Well,
19 this document stands for the fact that in 1959 only 1
20 percent of the people thought that smoking caused lung
21 cancer, nobody knows unless they really bother, 30
22 pages or so, to actually go back and look at the
23 document, that the question was never asked, and that
24 it's entirely possible that 90 percent of the people
25 believed that if somebody had asked them that.

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1 May not have been the first thing that popped
2 into their head, but every person might have said it if
3 they had been asked. But you know what? It gets
4 repeated and repeated and repeated, and pretty soon it
5 becomes the truth, people pretty soon they say: Well,
6 that's the truth, 1959, 1 percent of people. And it
7 isn't the truth. That's not being fair.

8 Here's another one, I tried to pick ones that
9 illustrated a point. Plaintiffs Exhibit 1657 was a
10 board presentation by Dr. Wakeham. And it was
11 presented to you for you to draw a conclusion that
12 Philip Morris thought that people smoked for nicotine.

13 But when you look through the whole document,
14 you look through this whole document, 1969. And it was
15 a presentation based on what Dr. Dunn's group was
16 doing. What you find out when you look through the
17 whole thing is that Dr. Wakeham said: This is a very
18 small part of what we do in research and development.
19 It's 3 percent of our overall effort. And you know
20 what? It says, on page 237 of this document: We're
21 embarrassed to tell you this, but we really don't know
22 why people smoke.

23 There's nothing in here about it being
24 addictive. And Dr. Dunn's views, which are expressed,
25 that nicotine is pharmacologically active, are in here.

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1 Sure, they're in here. But other people had different
2 views at the company. Lots of other people had
3 different views.

4 There was a document I showed you during the
5 course of the case, a doctor by the name of Fagan, who
6 really was unhappy about Dr. Dunn's views.

7 Why can't I get this thing to work?

8 Still not working, Chris. Well, heck with
9 it.

10 There's another exhibit, 3956. You can find
11 it. It's in evidence, 3956. And in it -- here, I'll
12 just show it to you.

13 Looks like I've broken down already with my
14 machine, but it goes like this: Dr. Dunn has said his
15 primary goal, the solution of the problem of what it is
16 that keeps the smoker smoking. This is a laudable
17 objective in trying to answer an intriguing question.
18 It seems, however, that he has prejudged the issue and
19 has decided that the answer is the psychophysiologic
20 effects of nicotine, the major effort of the group is
21 to find evidence and to substantiate the single
22 hypothesis, this is much too narrow of an approach.

23 And he's critical, Dr. Fagan. So you can't
24 jump to a conclusion that one person's view is
25 everybody's view or, unless you look at the whole

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1 document, you wouldn't find in there something that
2 says: You know, I'm embarrassed to say it, but the
3 simple truth is we don't know why people smoke. We're
4 this big, sophisticated company with all these great
5 scientists, but we don't know.

6 Here's what I'll do quickly, because I'm
7 worried about the time that I have, there was a
8 document that was used, Plaintiff's Exhibit 1958,
9 yesterday. And there was one sentence taken out of
10 that document about -- and you had to kind of draw the
11 inference from the sentence that INBIFO, the German,
12 the laboratory that Philip Morris uses to do animal
13 inhalation testing in Europe, that the reason for doing
14 that is to hide records that might be produced in
15 litigation. And that was read to you.

16 But, you know what? I went back and found
17 Exhibit 5141. And this is a document, a multi-page
18 document, but it goes on at great length about INBIFO
19 and what it does and what its purpose is. And the
20 problems that the company had trying to get contract
21 labs to do the work because there were so few of them
22 in the United States that could do this kind of work.

23 And they talk about: There's been a decrease
24 in the available domestic contract laboratories, a long
25 lead time required to initiate studies in contract

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1 laboratories; that there's a problem with keeping the
2 confidentiality of our additives when you send things
3 out to contract laboratories; that once you sign a
4 contract, you're stuck with it. You can't say: If
5 this thing isn't working, we can end it. You're stuck
6 once you're in a contract lab. That we need a
7 capability to do animal inhalation testing. We need to
8 be able to do these things for product safety and
9 product testing.

10 All of that, that's in Exhibit 5141. And you
11 can look at that exhibit to try to get a fuller story,
12 a fairer story on these things.

13 Here's one that you have to look at the
14 document and then say -- I wanted to give you an
15 illustration of what did the company do.

16 Here's one that was used yesterday. Trying
17 to find a number. Looks like 3297, or 3227. Hard for
18 me to tell. I think it's 3297.

19 Anyway, this is a document in which
20 Dr. Osdene wrote -- he's talking about CTR, and he
21 said: You know, Dr. Abood wants to get a grant for
22 doing something that would be an antagonist to
23 nicotine. And this would have the potential of putting
24 tobacco manufacturers out of business.

25 An antagonist to nicotine, something that

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1 would make nicotine not work. You know, antagonist to
2 nicotine. Well, this is what I mean about, what did
3 the company do? This was 1978. Well, in 1985, what
4 the company was doing was working, had about 100
5 scientists working on putting a product on the market
6 without nicotine.

7 The company was determined and dedicated --
8 and I'm going to talk about it in a few minutes -- to
9 say: We can sell cigarettes without nicotine. Let's
10 spend 300 million dollars to prove it.

11 That's what the company did. That's what the
12 company did. They worked on taking nicotine out of
13 cigarettes with a new process that they thought would
14 work, and said: Let's invest in it. Let's put it on
15 the market. Let's make it available to smokers.

16 What did the company do? Actions count.

17 Now, you were read -- you were read a letter
18 that Mr. Califano wrote the tobacco companies in 1979.
19 And the tobacco companies -- some of the responses, and
20 I think the response you were read was from
21 Mr. Weisman, at Philip Morris 20 years ago, 1979. And
22 I wrote down in my notes what he said about that. He
23 said: This document shows that Philip Morris or the
24 tobacco companies weren't willing to spend 10 cents to
25 tell kids not to smoke.

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1 Well, there's another way to characterize
2 that document, if you read it in connection with the
3 Califano letter, and the other way to characterize it
4 is: What he said was the truth. Because there were
5 two things that weren't pointed out to you about what
6 he said in that letter to Califano.

7 He said, first of all, you should know,
8 Mr. Secretary, that the companies have taken, on their
9 own, voluntary steps to make sure that our advertising
10 doesn't appeal to kids. Voluntary undertakings, the
11 code. And furthermore, the evidence is that
12 advertising isn't going to affect kids' smoking one way
13 or the other, so it's a waste to do it.

14 And Dr. Semenik came in and told you that, in
15 fact, advertising doesn't affect kids' choices, their
16 decisions on smoking.

17 And he just said it, he said, you know:
18 Advertising isn't effective in altering the behavior of
19 teenagers with regard to the use of cigarettes.

20 What he said was true. And he said: By the
21 way, we're doing things. And by the way, years later
22 all the companies have programs to try to keep
23 cigarettes out of the hands of kids. They put a lot of
24 money in it and they put their -- they put a lot of
25 effort in it.

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1 And you heard about those programs. So, you
2 know, to say that is just not fair.

3 Now, you were shown two documents about a guy
4 named Myron Johnston, and I wondered whether you
5 remembered, I wondered whether you remembered that
6 Mr. Morgan talked about Myron Johnston when he was here
7 on the witness stand.

8 And these documents were read to you as if
9 what was said in those documents showed that Philip
10 Morris was doing research into the underage smoking
11 market so they could target kids. That's what the
12 purpose of showing you those documents. Not so. Not
13 so.

14 Mr. Morgan told you that Myron Johnston
15 wasn't even in the marketing department, he was a
16 demographer in Richmond, had nothing to do with
17 marketing.

18 You look at the documents, you see that what
19 Johnston is doing is looking at public data, publicly
20 available data. Mr. Morgan told you what he did with
21 the information, and he said he would send it to the
22 forecasting department so they would forecast out in
23 the future what the volume of the market would be.

24 And you know what? You have evidence of
25 that. There's a document that's admitted into evidence

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1 in the case. It's Defendants' Exhibit 36825. 36825.

2 It's a 1985 memo.

3 I'm sorry, I just couldn't get these on
4 boards in time here. But it's a 1985 memo where
5 Mr. Zolar takes a Myron Johnston memo and he sends it
6 to the forecasting department, and he says: Here,
7 here's the Johnston stuff so you can update your
8 forecasting model.

9 Myron Johnston hadn't a thing to do with
10 marketing, nothing. He had nothing to do with
11 marketing, wasn't where the marketing department was,
12 and they didn't use his stuff for anything.

13 And yet, you get these documents, and they
14 take them and they say: This is what it means. And it
15 doesn't mean that at all. It's just not fair to do
16 that. It's not fair.

17 Now, I told you, and I meant it, not
18 everything, far from it, not everything that was done
19 was perfect. You were shown -- far from it. You were
20 shown a document yesterday by Mr. Dunn which talked
21 about a proposed study by Carolyn Levy, and said: You
22 know, I'm going to tell her to do this research. And
23 if it doesn't come out the way we like, we can bury it.

24 Now, is that a document, is that a document
25 that -- well, is it a bad thing to propose? Sure it

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1 is. Is it a bad thought to have? Absolutely. Is it a
2 bad thing to write? Absolutely. It would have been
3 really bad if it happened.

4 There are at least two things you know about
5 it. One is, if that research hadn't been done and kept
6 and maintained in the company's records, you'd have
7 heard about it. If that research hadn't been done and
8 kept and maintained, you would have heard about it, and
9 you didn't.

10 And the document itself is here, isn't it?
11 It was produced. It was produced. The company kept
12 the document. And when it came time to produce records
13 in litigation, it produced them.

14 So, you know, yeah, right, there were things
15 that were said. But over 50 years, there weren't all
16 that many, either.

17 And what about the transcript on whatever it
18 was, Meet the Press, when Joe Coleman made the
19 statement on the television show about low birth weight
20 babies. Remember that from yesterday? He made a
21 stupid comment on that television show, when he was
22 saying: Yeah, well, it's true that, yeah, we agree
23 it's true that people who smoke, women that smoke tend
24 to have lower birth weight babies. But, you know,
25 what's wrong with having smaller babies?

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1 Or some comment to that effect. That's a
2 stupid, insensitive comment. And I don't run away from
3 that. But there's something else you need to remember
4 about that, and that's this: The way science learned
5 that there was a connection between smoking and low
6 birth weight babies was from research that was funded
7 by the Council for Tobacco Research and published in
8 the mid 1960s, 20 years before it ever appeared in a
9 Surgeon General's Report. That's where it came from.

10 Scientists that got grants from the tobacco
11 companies discovered that and they published it. So
12 that's, you know, I'm not telling you that everything
13 was perfect; but look at the documents in fairness,
14 don't take a document like: 1 percent of people say
15 smoking -- only 1 percent say smoking causes cancer.

16 It's just wrong to do that. Look at
17 documents for the other documents that surround them
18 that say this guy's opinion wasn't what the other guy's
19 opinion was. You have to be fair when you look at
20 these things. You have to consider them in context and
21 over the course of 50 years.

22 You know, during the course of the case there
23 was a document that was shown, a document about
24 compensation, it was PX 3413. It was a Philip Morris
25 document. PX 3413, 1975. And a witness was shown it

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1 and said: Doesn't that show, at Philip Morris, you
2 think that, you knew in 1975 that people compensate?
3 And it was only later that we introduced into
4 evidence, because we had to go back and respond, a 1974
5 document and a 1976 document, which are exhibits,
6 Defense Exhibit 5512, 5512, and Defense Exhibits 36209,
7 that showed there were two other studies, one before
8 and one after, that said the opposite, where they
9 concluded the opposite. Science does that, scientists
10 do that, but you wouldn't know that.

11 Now, I want to talk about the -- what's their
12 name, Drs. Morgan -- Drs. Morgan, Farone, Mele and
13 Uydess. I want to talk about those for a few minutes,
14 their evidence, the former employees of Philip Morris.

15 I was going to save this part of the time
16 that I had because, you know, for better or worse, I
17 actually get to talk to you twice, at the beginning of
18 the defense presentation to you and at the end. And I
19 was going to save this until the end. But I decided
20 last night that I just, I had to do this now.

21 Now, look at these four people. What do they
22 have in common? Three of them were fired. Fired
23 employees. And the fourth, Dr. Uydess wasn't; he left
24 on his own, Dr. Uydess. But three of them were fired.
25 And they were angry. They were angry.

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1 And let's start with -- let's start with
2 Dr. Ray Morgan's charges, because his charges that you
3 heard about yesterday or the day before, I forget, were
4 the most personal of the charges, because he, he's the
5 one that testified by videotape. And he's the one that
6 said that Dr. Cathy Ellis and Dr. Robin Kinser had
7 ordered him to destroy some test results.

8 So I want to -- those are very personal
9 charges. Think about that. Somebody comes and says:
10 You, you were the one. And it was a test result that
11 showed that the nitrosamines from a Virginia Slims
12 cigarette had 10 times the level of anything that had
13 ever been shown before, and you did it. You ordered
14 the destruction of that test data.

15 It's very personal, very personal charge.
16 Had to be responded to. It was responded to. I
17 brought Cathy Ellis, Dr. Ellis in. And she's right,
18 she looked you in the eye, came here, sat on the
19 witness stand, looked you in the eye and said: I
20 didn't do that. I would never do that. Dr. Ellis.

21 But she did more than that. She said: When
22 I heard about this charge, here is what I did because
23 my scientific integrity and the integrity of the
24 company was on the line, and here's what I did. I
25 first went back to his laboratory notebooks after he

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1 had left, and there wasn't any reference to any of this
2 test that he talked about in his testimony, which is
3 all numbered pages. But I knew it would be said that,
4 well, maybe, maybe he destroyed the data before it went
5 in the notebook.

6 So what did she tell you? She said: I went
7 to the chamber log, I went to the chamber log. Now,
8 you remember what this was. This was testing the
9 sidestream smoke from a Virginia Slims cigarette, so
10 you do that in like a closet, and it's run by
11 technicians. And the technicians are required, before
12 anybody runs a test in there, they have to log it in
13 something called a chamber log before the test is done.
14 They've got to put it in there, because the technicians
15 do the test. You do it, you put it in the log.

16 So she said: I went to the chamber log for
17 the time period in question, and I looked through the
18 chamber log, and there's no test that was run when he
19 said it was run.

20 And they're numbered pages, too. And she
21 brought the original notebooks with her. I hope you
22 remember, she brought them, stacked them up. And she
23 invited Mr. Rosenblatt to cross examine her about it.

24 Here they are. Here's the original
25 notebooks, here's the laboratory notebook, here's the

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1 chamber log. Cross examine.

2 It didn't happen. It just didn't happen.

3 Did you notice -- did you notice what
4 happened at the end there? Dr. Ellis wasn't asked
5 anything about the chamber log. Just wasn't asked
6 anything about it. But at the very end, the question
7 was asked: Well, the charge is that Dr. Kinser was the
8 one who actually relayed the order to destroy it, and
9 you weren't, you couldn't have been present in any
10 meeting that Dr. Kinser had with Ray Morgan.

11 And she, of course, said: No, I couldn't
12 have been. You know, obviously, no.

13 So I knew what was going on. What did I do?
14 I brought Robin Kinser here, I brought Dr. Kinser to
15 testify, as well. I put her up on the witness stand
16 and said: Did you ever do that? Did you ever do that?

17 And she said: No, I wouldn't do that. I
18 didn't do that. It didn't happen.

19 Dr. Ellis told you another thing. I should
20 have remembered to get the dates when they testified,
21 because you probably have dates in your notes, but I
22 didn't. But Dr. Ellis told you another thing. She
23 said, just to make sure, she had the tests run over
24 again. She got the description of the test that
25 Dr. Morgan said in his deposition, and she ran the same

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1 test over again.

2 She had a doctor in Switzerland, who had been
3 with the American Health Foundation, to run the test.

4 Tests didn't show anything like what Dr. Morgan said.

5 And, in fact, the test showed very much what had been
6 tested on the same cigarette in 1987.

7 What more can you do when somebody charges
8 you with something like that? What in the world more
9 can you do?

10 Now, the argument is going to be made: Why
11 would he lie? That's the argument that's going to be
12 made. Why would he lie? Who knows? Maybe losing his
13 job was part of it. Because he was laid off, Dr. Ellis
14 told, but being laid off -- and maybe he didn't know,
15 because Dr. Kinser never told him, that she had
16 actually gone to bat for him.

17 When the layoffs were coming, when the
18 company was laying off a bunch of people, she had
19 argued against laying him off.

20 And I asked her, I said: Well, did you ever
21 tell him that?

22 And she said: No, I didn't. I was his
23 manager. My job was to do my job. But I did try to
24 keep it from happening.

25 And you remember, he said in his deposition

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1 -- I wasn't going to mention it, but Mr. Rosenblatt
2 mentioned it yesterday -- he said in his deposition
3 that this was a hard time in his life. He had some
4 medical problems, and he was taking medication. It was
5 a hard time in his life.

6 So we don't know. But what you do know is
7 that it didn't happen. It was disproven, this charge
8 was disproven. It didn't happen the way plaintiffs say
9 it happened.

10 Now, Dr. Farone, move on to Dr. Farone. What
11 about Dr. Farone? Was he angry when he left Philip
12 Morris? That's almost the first question I asked him.

13 Now, this is the guy who -- this is a long
14 time ago -- trying to bring this back to you, this goes
15 back to November 17th, so try to go back to November
16 17th for Dr. Farone. This is a guy who said he had --
17 he was a high ranking guy in the company but he had
18 been promised a promotion, and it was announced, it was
19 a big deal, it had been announced. And he said his
20 wife had been promised a promotion. And then there was
21 a management change, and he didn't get his promotion
22 and she didn't get her promotion.

23 And I asked him, I said: It's perfectly
24 normal to be angry about that.

25 He said: I wasn't angry.

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1 That was almost the first thing in his cross
2 examination: I wasn't angry.

3 Well, he was angry.

4 Then I asked him -- try to find it in here.

5 Then I said to him: Well, look, okay, you
6 weren't angry, but didn't you, didn't you actually
7 prepare, ask your lawyer to prepare a complaint against
8 the company, and then tell the company about it?

9 And he said: No.

10 He said -- and I'm reading from the
11 transcript at 15133, he says: No, I don't think
12 lawsuit was ever mentioned in any of the things that we
13 ever did. As a matter of fact, right up until the time
14 of my termination, my relationships, and even post my
15 termination, my relationships with Dr. Hausermann and
16 the company, I mean, lawsuit was not mentioned at that
17 point.

18 Then I showed him the letter.

19 Whoops, how did I do that? Whatever.

20 This is to advise you, I retained an
21 attorney, June 26.

22 Oh, it was probably better that way. Anyway,
23 let me see if I can get it back. Whatever I did to do
24 that, I don't know, so I can't do it again. So I'll
25 read it:

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1 This is to advise you that on June 25th I
2 retained an attorney.

3 And down at the bottom: I've instructed my
4 attorney to prepare to file a complaint.

5 Magic.

6 But not to file it pending your return from
7 vacation and your advice on how to proceed, your
8 determination with senior management on our ability to
9 negotiate a mutually satisfactory solution.

10 Thank you whoever is doing that.

11 Anyway, so, you know, what was he doing
12 there? Did he forget about it? Did he forget about
13 that or was he trying to cover up the fact that he was
14 angry? Did he try to cover up the fact that he's been
15 angry ever since, and has been testifying for some
16 years now against Philip Morris in every -- you know,
17 in a whole bunch of different places?

18 So let's look at what he said now. Let's
19 look at the quality of his evidence for a few minutes.

20 First he says that he was told that copies of
21 a document from INBIFO that had to do with the testing
22 of a product was -- Dr. Osdene told him that he was
23 destroying that document.

24 If you ever go back and look at that
25 testimony, it's kind of interesting because in that

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1 testimony he's actually talking about a document that
2 showed that they had been successful in reducing the
3 level of nitrosamines.

4 Interesting that Dr. Osdene would say: I've
5 got a copy of this from INBIFO and I'm destroying this
6 favorable test result.

7 But in any event, that's what he said.

8 Now, Dr. Farone said, he said, you're right,
9 I don't know anything about INBIFO. It wasn't my
10 responsibility, it was somebody else's responsibility.

11 So I brought you somebody who had
12 responsibility for INBIFO. And that was Dr. Richard
13 Carchman. And Dr. Carchman said that for the 10 years
14 he was with the company, he had everything to do with
15 INBIFO, he was in charge of it, and he had looked back
16 through all the recording of INBIFO, going back to when
17 Philip Morris had acquired the company; and, as far as
18 he could tell, there was nothing missing from the
19 records, that all the research that was done at INBIFO,
20 the original records of research at INBIFO were there.

21 And that would make sense because, in 1983,
22 just about the time that Dr. Farone is talking about,
23 there's a letter.

24 I see what happened here. We got the
25 stickers mixed up. Anyway, there's a letter -- I bet

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1 if I go back a page. Okay.

2 This is from the Food and Drug
3 Administration. It's a Good Laboratory Practices
4 certification, 1983 for INBIFO. And what that
5 certification says is that you're in compliance with an
6 Acceptable Compliance U.S. Good Practices Regulations.

7 Dr. Carchman explained to you what that
8 meant. He said: You don't get that. That's called a
9 GLP certification, it's a big deal.

10 And he said: You don't get it if you haven't
11 maintained fastidiously the original records of your
12 research.

13 And there is no contradicting -- there's no
14 evidence in this record. And Dr. Carchman, in fact,
15 said it the other way; he said: When requests for
16 documents were made in litigation, INBIFO's records
17 were made available. INBIFO's original research
18 records were made available.

19 So the idea that somehow or another something
20 was being hid because it was, the research was being
21 done at INBIFO, it wasn't being hid. And when requests
22 came from plaintiffs' lawyers in litigation that said,
23 "Give us your documents," INBIFO turned over 80 -- I
24 forgot, 800,000 pages of research. That was done at
25 INBIFO.

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1 Now, what else did Dr. Farone say? He said:

2 Well, the company didn't test its commercial
3 cigarettes.

4 That was a pretty big deal. But it turned
5 out it was an overstatement, because then he went back,
6 and at another point -- I'm not going to read a lot
7 from the transcript, because it would probably take me
8 too much time -- but in it he says: Well, except that
9 they did do in vitro testing in Richmond, which is
10 exposing cells, human cells and animal cells to smoke
11 to see what kind of response you get.

12 He said: Well, that's important testing.

13 Well, yeah, okay, they did do that. They
14 didn't do the animal testing, and they didn't test
15 these commercial cigarettes. And, you know, they used
16 reference cigarettes, and that's a bad thing to do, to
17 use reference cigarettes, because reference cigarettes
18 are all tobacco, they don't have the additives in them.

19 And what do you get when you're testing them?
20 You're not testing Marlboro, you're only testing
21 commercial cigarettes.

22 And Dr. Carchman came, and he explained to
23 you why you do that. He said: We separate
24 ingredients. We test the ingredients. And I'll tell
25 you about that in a minute. And we test them so well

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1 that we tell the government what's in them. And
2 independent people look at them, and we test them and
3 there's just nothing wrong with our ingredients. You
4 test the tobacco separately because the problems, the
5 health problems, the health risks come from burning
6 tobacco. And you need to just put tobacco and burn it
7 and see what you get, and test that because if you
8 don't do it that way, you're not testing the biological
9 activity from the tobacco. And scientists around the
10 world who are doing the same thing can't do a
11 comparison, everybody has got to be working off the
12 same reference.

13 That's why it's called a reference cigarette.
14 And if you have any trouble with that, consider this,
15 you've never heard a complaint by any public health
16 authority or scientist or group of scientists that
17 said: Those tobacco guys are bad guys because they
18 test their reference cigarettes.

19 You don't find it in a Surgeon General's
20 Report, you don't find it in anybody's report. And the
21 reason is, there's nothing wrong with it. It's the way
22 you should do it. It's the way the Tobacco Working
23 Group did it, the group that Mr. Ross is going to talk
24 about when he comes up and talks about the evidence.
25 The group where the government, the public health

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1 community and the tobacco companies all worked
2 together. They used reference cigarettes. Because
3 that's the only way you can do it.

4 The only place it's ever been criticized has
5 been in a courtroom. Dr. Farone decides he's going to
6 criticize it. So there's that.

7 Now, a couple of other things I want to point
8 out about Dr. Farone.

9 I know I've got to move quicker.

10 There was one day -- there was one day when
11 he said -- he said: Everybody at the company knew that
12 nicotine was addictive.

13 And that was, you know, that was quite a
14 statement to make. So I showed him memoranda that are
15 in evidence written by other scientists that said: We
16 don't think nicotine is addictive. You know, it's got
17 certain qualities, may be reinforcing, but other things
18 are reinforcing. We don't think it's addictive.

19 And he said: Ah, that's just memoranda --
20 those memos, they just got created because Dr. Osdene
21 wanted to have some memos like that floating around the
22 company. That's what he said.

23 So then, I took one of those memos that he
24 was talking about, and I showed it to him. And I said:
25 Didn't you testify somewhere else that you didn't have

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1 any idea about this memo before? You didn't have a
2 clue about it, you didn't know where it came from, what
3 it stood for, right?

4 And I had his other testimony. Dr. Farone's.
5 And he said: Well, yeah, I said that about that
6 document, yes.

7 So how can you come into the courtroom and
8 say that, when you've said the opposite somewhere else?
9 Is he angry?

10 And then there was another incident. This is
11 the last one I'll talk about with Dr. Farone. As part
12 of that whole thing, he said: Well, it says, it says
13 in company documents that nicotine is addictive.

14 And I said: Tell me one.

15 And he said: Okay. I'll tell you one.

16 Remember that document, Smoking and
17 Incentives, the conference that Bill Dunn had in 1972?
18 He wrote a paper and it says it right in there. I hope
19 you remember this.

20 So over lunch, I took the paper, all seventy
21 some pages, and I read it. And I came back in and I
22 said to him: Now, Doctor --

23 Reading from Page 15206: Now, Doctor, could
24 you take a look through that exhibit and tell me if you
25 can find any place in there where Dr. Dunn explicitly

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1 says that nicotine is addictive?

2 And he says, he answers by saying: And by
3 that, you mean, uses specifically the word "addictive"
4 or "addiction"?

5 And I said: Yes, sir.

6 Now, if you were taking notes then, I'm sure,
7 maybe you would have written, maybe not, "long pause."
8 Because I stood there that afternoon, right after
9 lunch, and I waited. And I waited. And I waited some
10 more. And you all waited with me. You all waited with
11 me.

12 Then, finally, he started answering the
13 question, and he said things like: Well, it says, you
14 know -- he would say things like: Well, it says it's
15 psychoactive or it's reinforcing. And I would say
16 yeah, it says those things, but so is saccharin and so
17 is other things. Yeah, it says this and that, but
18 where does it say it's addictive?

19 And he finally -- I said, you can't find the
20 word "addiction" in there, right?

21 That's correct.

22 And you can't find the word "dependence" in
23 there either, right?

24 I didn't look for "dependence," but since you
25 probably looked at it more carefully, I'll accept that.

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1 Well, he was right. I did look at it more
2 carefully.

3 Now, there was a difference between
4 Dr. Farone, when he was talking about other people, and
5 when he was talking about himself. You may remember, I
6 asked him whether he thought the work he did was good
7 and whether he made things better, ventilation work,
8 did you really work to try to keep people from blocking
9 the ventilation holes?

10 Yeah, that was my work.

11 That was good work. And work he did on
12 expanded tobacco, that was a good thing. And filter
13 ventilation, you know, paper ventilation, he said all
14 those things served the interest of the medical and the
15 scientific community.

16 And then when he left Philip Morris, the
17 company was still continuing to make products safer.
18 He said all of that, what he was doing. Philip Morris
19 was trying to make a safer cigarette.

20 Now, this is the guy who said the words, on
21 the day that he was fired -- not nice being fired --
22 remember, he said -- I don't remember the Latin, he
23 said: The die is cast. The Latin: The die is cast.

24 The declaration of war, and he's been waging
25 war ever since. And you know, Mr. Rosenblatt said

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1 yesterday: Well, he didn't start -- I think he was
2 talking about Dr. Farone. May have been one of the
3 other witnesses, but he said: But Dr. Farone, he
4 didn't start really testifying against the company
5 until years later, it was years later before he started
6 testifying against the company.

7 Well, all I can tell you is that you should
8 consider this. I grew up in Philadelphia. And in
9 South Philadelphia, they have an Italian expression,
10 not Latin, it's Italian -- I used to know the Italian,
11 but I don't know it now -- but the translation of it is
12 this: Revenge is a dish that tastes best cold.
13 Revenge is a dish that tastes best cold.

14 Dr. Farone was angry. Now, Dr. Mele, what
15 about Dr. Mele? This is a guy that comes in and says,
16 it was remarkable, he says, Philip Morris had no
17 concern for the -- I forgot the exact language -- the
18 health of its customers.

19 What was he doing at the company? He was
20 working on a nicotine analog program. And he testified
21 that the purpose, the reason that the company had a
22 nicotine analog program was that there was a concern
23 that nicotine had a cardiovascular effect.

24 That concern later, Dr. Benowitz said, kind
25 of went away. But at the time in the early '80s, and

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1 what the company was trying to do was find a substitute
2 for nicotine that would give a smoker the same thing
3 that nicotine gives, the same pharmacological effects,
4 but would not increase blood pleasure.

5 So it would have -- what in the world was he
6 doing? He was working on a health issue. And this is
7 a guy that comes in and says, doesn't have any concern.
8 That's what his job was. That's what Farone was doing,
9 they were working on health issues.

10 Dr. Carchman said: I looked at th : rds
11 of that analog program, and the problem with it was
12 they never found an analog that would do both things.
13 Analog is a chemical substitute for a natural
14 substance, nicotine is a natural substance that's part
15 of nature, that God puts nicotine into tobacco.

16 So they were trying to find a substance to
17 substitute for it that didn't increase people's blood
18 pressure. And what -- Carchman said they never were
19 able to do it, that when they found one that would give
20 the nicotine properties, it also increased blood
21 pressure, had the cardiovascular one.

22 Of course Dr. Mele is going to be
23 disappointed it didn't work. Of course he's going to
24 be disappointed that that program was discontinued and
25 it didn't work. But he's only seeing one piece of it.

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1 And he testified that he wasn't part of the
2 cardiovascular part of it; he was only part of trying
3 to get a substance that would be like nicotine, you
4 know, that would give you the same pharmacological
5 effect of nicotine. That's what he was doing.

6 Okay, so that was Dr. Mele. And he said, he
7 said: And the rat laboratory was closed down, that was
8 closed down and there was never a scientific reason and
9 there were lawyers around and the lawyers, that it was
10 the lawyers that shut the rat lab down.

11 And besides, whenever they brought the rats
12 through the building, they put a hood over it. And
13 that was secret so you wouldn't see the rats.

14 Well, my God, why wouldn't you put a hood
15 over rats when you're bringing it through the company?
16 People want to watch rats running around the company.
17 That's a big secret.

18 As far as closing it down, there were
19 lawsuits against the company? Absolutely, there have
20 been lawsuits against this company for years and years
21 and years. Were there lawsuits? Yes. Were there
22 lawyers around defending lawsuits? Yes.

23 And, you know, what if this happened? Let me
24 ask you this: What if this happened? What if a lawyer
25 said -- a lawyer said: You know, this rat work, I

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1 don't know whether it's getting anywhere
2 scientifically, I don't know whether it is or it isn't.
3 You have to decide that, but, you know --

4 And Dr. Farone, by the way, he says rat work
5 isn't predictive of anything, he doesn't value rat
6 work. That was part of his testimony.

7 But I don't know whether it's getting you
8 anywhere, but I'll tell you this, people are going to
9 come along in these lawsuits and they're going to take
10 the results of what you're doing in there and they're
11 going to twist it and they're going to make it look
12 like you're proving that nicotine is addictive. And
13 you better think about that when you decide whether
14 it's scientifically okay to do that.

15 What if a lawyer said that? That's giving
16 advice to a client. And as long as the company looks
17 at that and says yes, that's a risk, that somebody will
18 misinterpret it, and we have to consider that.

19 Now, let's look at whether the work is
20 getting us anywhere. And it wasn't because they
21 couldn't develop an analog that worked. And they shut
22 the lab down. And that, suddenly, that's a big deal,
23 that's fraud.

24 And what does that have to do with anything
25 anyway? You know, what I mean, what does it have to do

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1 with anything anyway? What does it have to do whether
2 smoking is voluntary or involuntary? Nothing.

3 And you may remember that Dr. Mele did say
4 that there was a lot of concern about whether the FDA
5 would ever approve the use of an analog, anyway.

6 And just one other point about that while I'm
7 thinking about it, the one thing you do know about that
8 laboratory is that it wasn't proving that nicotine is
9 addictive. And the reason you know that is because I
10 asked Dr. Mele the question about what he told the
11 president of Philip Morris when the president was
12 visiting, and said: Well, what are you doing there?
13 What are you doing with nicotine? Are you proving
14 nicotine isn't addictive or is addictive?

15 And he said: We haven't proved it one way or
16 the other. That's not the purpose of the work that
17 we're doing.

18 So much for Dr. Mele.

19 Now, I just want to talk about Dr. Uydess
20 very briefly. And I thought it was interesting, I
21 thought it was interesting that Dr. Uydess came in here
22 and testified, and yet you heard very little about him.
23 Very little.

24 Now, ask yourself: Why did we hear so little
25 about Dr. Uydess?

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1 We brought him here -- the plaintiffs brought
2 him here to testify about what a bad company this is.
3 That's why he was brought. And the reason you didn't
4 hear very much about Dr. Uydess is the reason I told
5 you about earlier, that during the course of his
6 testimony when the subject of spiking came up, spiking
7 nicotine, he said it didn't happen. He said Philip
8 Morris wouldn't do that.

9 So that wasn't good testimony for the
10 plaintiffs. That's why you didn't hear much about him.

11 The other reason you didn't hear much about
12 him is that the big deal that he came down here to talk
13 about was three letters, NOD, N-O-D, which is probably
14 what some of you feel like you want to do at this
15 point. But naturally occurring denitrification.

16 The NOD program, naturally occurring
17 denitrification. That's what he was here to talk
18 about. And his whole testimony was that he had spent
19 virtually his entire career, or three or four years
20 anyway -- I don't want to overstate it -- he spent
21 three or four years figuring out a way to get these
22 little bugs, microorganisms, to eat nitrates in
23 tobacco, in reconstituted tobacco sheet.

24 And I hope I'm bringing this back to you.
25 Philip Morris had a process that took 60

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1 percent of the nitrates out called denitrification.
2 And he was trying to, and other scientists working with
3 him, to figure out a way to get all the nitrates out of
4 tobacco.

5 And they came up with this method, they came
6 up with this idea that you could take these little
7 microorganisms, they're alive, but you couldn't see
8 them, and they put them in there and they eat the
9 stuff. And that takes all the nitrates out.

10 And that would have been a great idea. And
11 he was really wedded to it, and he said: There was no
12 scientific reason for not using this process.

13 I ask you whether that makes any sense. They
14 put millions of dollars in this thing and according to
15 Dr. Uydess it worked. Dr. Uydess, I understand how he
16 felt. It was a big project that he was invested in.
17 He cared about it. It's good to care about it.

18 But does it make sense that, if it had
19 worked, they wouldn't have used it after spending
20 millions of dollars on it?

21 And then, beyond that, I brought you Dr. --
22 not Dr. -- I kidded with him, I called him the most
23 under educated guy to come to the witness stand --
24 Harold Burnley, whether you remember, he's the chief
25 process engineer of the company, he's the guy that goes

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1 into the factory and makes things work, the guy who
2 takes what the scientists and the research and
3 development lab, the worker, the guy that goes out and
4 says: All right, now I've got to see if I can get this
5 thing to work. The guy with the white coats over there
6 they say it's going to work. Let's go into the factory
7 and see if we can get it to work.

8 He said: We couldn't get it to work. He
9 said there were three reasons: First is, and I had a
10 little chart -- I'm trying to whip through this, but I
11 want to bring it back to you--he said three reasons,
12 the first reason was sometimes -- start-up problems;
13 sometimes it would start up, sometimes it wouldn't.

14 He said: Most of the time it would start up,
15 and some of the time it wouldn't, and you can't have an
16 industrial process like that. When you're running a
17 production line, you can't have a process that starts
18 up most of the time but doesn't start up some of the
19 time because, when it doesn't start up, nothing is
20 eating the nitrates, and we can't put that product out
21 there.

22 Then he said there was a second reason. And
23 he said the second reason was that the bugs ate the
24 stuff at variable rates. Sometimes they ate it fast,
25 sometimes they ate it slower. And you can't design the

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1 equipment that way unless you know the rate they're
2 going to do something.

3 He said: This is my job. I've got to make
4 it work in the plant.

5 And then the third reason -- how do I put
6 this delicately? These microorganisms are alive, they
7 excrete, okay? That's as delicate as I can put it.

8 And their waste products make the tobacco smell.

9 He said: What happens is sometimes they
10 smell like -- what did he say? -- rancid butter; other
11 times they smell like athletic socks, used, gym socks.

12 And he said: You know, we tried everything
13 we could to mask that problem, but we couldn't solve
14 it. So he said: You know, I had to make a decision.

15 And I'm just going to show you a couple of
16 his quotes and move on. But the problem is they just
17 couldn't get the thing to work. And that was
18 Dr. Uydess.

19 Let's see if I can bring some of this up.

20 Dr. Uydess saying: Yeah, I agree it has to be
21 controllable.

22 Dr. Geisch, writing a letter: The most
23 important feature of any industrial processes is --

24 These are exhibits.

25 The most important feature of any industrial

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1 process is its controllability. But how do you keep
2 the process on the rails?

3 Dr. Burnley, I mean, not Dr., Harold Burnley:
4 If it would have worked, we would have installed it.
5 It never got to the point where it worked.

6 I'm sorry. Did I do that too fast?

7 Anyway, then I'll read you the last line,
8 bottom line, March 19th, he testified, in case you want
9 to look at it, but March 19th was when Harold Burnley
10 was here. And I'm reading from Page 28472 of the trial
11 transcript.

12 He said: I made the recommendation because I
13 was the chief process engineer, and I had a
14 responsibility to make that recommendation, and I made
15 it. And the people who I made it -- and the people who
16 I made it to accepted it. I was on the line, my job,
17 I'm a guy that's got -- I've got to make it work. I
18 decided it couldn't. I made a decision.

19 So there you go. There's the testimony of
20 the former employees, three of them who were fired and
21 who were angry and one Dr. Uydess who was very, very
22 disappointed, understandably, but didn't see the whole
23 picture.

24 And yet there is a point to be made about all
25 of them. And the point to be made is that, if you

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1 really think about it, they were all working on trying
2 to make cigarettes safer. They were all part of the
3 600 scientists that Philip Morris, at Philip Morris,
4 trying to make cigarettes safer. That's what they were
5 doing in their own ways, in their own jobs: They were
6 working on making cigarettes as safe as they could be
7 made.

8 THE COURT: If you're having a problem with
9 the time frame, that's no -- we can break now and come
10 back after lunch.

11 MR. HEIM: Why don't we do that? I think the
12 jury would like to eat lunch. And I'll finish very
13 soon after lunch.

14 THE COURT: All right. I see you trying to
15 rush it. We'll take one hour for lunch, so it's 12:30,
16 come back at 1:30. And the same rules apply
17 (The jurors exited the courtroom.)

18 THE COURT: All right, folks. Court is still
19 in session, so you ought to behave. You can begin
20 talking when I declare a recess, which I shall now do.
21 Court is in recess.

22 (A lunch recess was taken at 12:35 p.m.)

23

24

25

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